NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
October 2019

An Organized Compilation of Summaries of Selected Decisions Addressing "Civil Procedure" Released by the New York State Appellate Courts and Posted Weekly on the New York Appellate Digest Website in October 2019. Click on the Entries in the Table of Contents to Go to the Summaries. Click on "Table of Contents" in the Header to Return There. Click on the Case Citations to Go to the Full Decisions on the Official New York Courts Website.

Contents

Table of Contents

Table of Contents

Table of Contents

90-DAY NOTICE.

SUPREME COURT WAS WITHOUT POWER TO DIRECT DISMISSAL OF THE FORECLOSURE ACTION FOR FAILURE TO PROSECUTE BECAUSE A 90-DAY NOTICE HAD NOT BEEN SERVED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure action should not have been dismissed for failure to prosecute because a 90-day notice had not been served:

In April 2009, the plaintiff commenced this action against the defendant Melchior Sansone (hereinafter the defendant), among others, to foreclose a mortgage secured by certain real property located in Suffolk County. In January 2011, following settlement conferences, the action was released from the foreclosure settlement conference part without any resolution. On July 20, 2012, the parties appeared at a compliance conference, at which time the Supreme Court directed the plaintiff to resume the prosecution of this action. By order dated November 21, 2012 (hereinafter the dismissal order), the court directed dismissal of the action upon the plaintiff's failure to resume prosecution of the action. The plaintiff subsequently moved to vacate the dismissal order, and, in effect, to restore the action to the active calendar. By order dated July 30, 2018, the court denied the plaintiff's motion, and the plaintiff appeals.

"A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met" … . These conditions include, among others, service of a written demand "requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand" (CPLR 3216[b][3] …). Here, the Supreme Court was without power to direct dismissal of the action on the ground of failure to prosecute because the plaintiff was not served with a written demand to serve and file a note of issue within 90 days … . U.S. Bank N.A. v Sansone, 2019 NY Slip Op 07807, Second Dept 10-30-19

APPEALS.

APPELLANT WAS NOT AGGRIEVED BY SUPREME COURT'S DECISION WHICH DENIED HER MOTION WITHOUT PREJUDICE PENDING FURTHER DISCOVERY; THEREFORE THE APPEAL MUST BE DISMISSED (THIRD DEPT).

The Third Department determined the plaintiff's Joan and Christopher Porco were not aggrieved by Supreme Court's ruling and therefore could not appeal it. The underlying action alleges Civil Rights Law (right to privacy) violations related to a film made by defendant about a crime committed by Christopher Porco. The complaint alleged the film had been republished making the action timely. Supreme Court denied the motion without prejudice to try again after discovery:

Christopher Porco is not an aggrieved party. Defendant's motion sought dismissal of only those claims asserted by Joan Porco. In other words, defendant did not seek any relief against Christopher Porco. Supreme Court likewise did not grant defendant any relief against him. Accordingly, Christopher Porco has no basis to appeal from the February 2018 order.

Regarding Joan Porco, Supreme Court held that she could not rely on the relation back doctrine for her claims in the amended complaint to be timely asserted. The court nonetheless denied defendant's motion without prejudice to renew upon completion of discovery after considering plaintiffs' republication argument. … Accordingly, the court neither granted defendant any affirmative relief against Joan Porco nor withheld any affirmative relief requested by Joan Porco. Indeed, the only affirmative relief sought by Joan Porco was for leave to serve a second amended complaint, which the court granted and is not contested on appeal. Because Joan Porco was not granted incomplete relief, the exception to the aggrievement requirement … does not apply in this case.

Furthermore, a party is not aggrieved when his or her interests are only remotely or contingently affected by the order appealed from … . Although Joan Porco's claims are subject to dismissal in the future given that Supreme Court denied defendant's motion without prejudice to renew, it is possible that defendant may never seek to renew its motion. And, even if defendant did move to renew, we can only surmise at this juncture how the court would decide it. Finally, to the extent that Joan Porco is dissatisfied with the court's rationale concerning the relation back doctrine, such dissatisfaction does not make her an aggrieved party … . Porco v Lifetime Entertainment Servs., LLC, 2019 NY Slip Op 07122, Third Dept 10-3-19

ARBITRATION.

THE ARBITRATION AWARD WAS INDEFINITE AND NONFINAL AND SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the arbitration award should not have been confirmed because it was indefinite and nonfinal:

Although judicial review of arbitration awards is limited …, an award will be vacated when the arbitrator making the award "so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511[b][1][iii] …). An arbitration award will be vacated as indefinite or nonfinal for purposes of CPLR 7511 if it does not "dispose of a particular issue raised by the parties" … , or "if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy" … .

Here, the appellant established that the arbitration award was indefinite and nonfinal inasmuch as it did not clearly define how the accounts receivable that were incurred prior to the date of the award were to be distributed. Moreover, the provision at issue created a new controversy between the parties with respect to the distribution of those funds. Accordingly, that portion of the award should have been vacated and the matter remitted … . Matter of Rosenberg v Schwartz, 2019 NY Slip Op 07587, Second Dept 10-23-19

CHOICE OF LAW.

THERE WAS NO CONFLICT BETWEEN NEW YORK AND PENNSYLVANIA LAW IN THIS PERSONAL INJURY CASE, THEREFORE NEW YORK LAW APPLIES AND THERE IS NO NEED FOR A CHOICE OF LAW ANALYSIS (FOURTH DEPT).

The Fourth Department determined New York applies in this action stemming from an accident in Pennsylvania:

New York law controls the resolution of its motion and this appeal. "[B]ecause New York is the forum state, i.e., the action was commenced here, New York's choice-of-law principles govern the outcome of this matter' " … . "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" … . Here, defendant failed to establish the existence of any conflict between New York and Pennsylvania law with respect to the issues raised in the motion,

and therefore we need not engage in any choice of law analysis … . Farnham v MIC Wholesale Ltd, 2019 NY Slip Op 07178, Fourth Dept 10-4-19

CLASS ACTIONS, LANDLORD-TENANT.

CLASS ACTION CLAIM BY TENANTS ALLEGING VARIOUS FORMS OF RENT OVERCHARGES PROPERLY SURVIVED A PRE-ANSWER MOTION TO DISMISS AND SHOULD PROCEED TO THE CERTIFICATION STAGE PURSUANT TO CPLR 902 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a three-judge dissent, determined the pre-answer motion to dismiss a class action claim by tenants alleging various forms of rent overcharges was properly denied and the matter should move on for a ruling on whether the prerequisites for a class action under CPLR 902 are met:

… [T]here is an element of truth to defendants' suggestion that the class claims — particularly those based on the alleged misrepresentation and inflation of the costs of IAIs [individual apartment improvements]— may require separate proof with respect to each plaintiff. Along those lines, defendants note that the operative complaint "alleges overcharges for inflated IAI increases of [various] amounts" — 136%, 97%, 82%, 104%, 113%, 33%, or 254% for various apartments — which they contend supports the idea that the alleged overcharges are separate wrongs to separate persons that do not form the basis for a class action … .

That leads to the friction point on this appeal: are we to look at the common basis for a damages claim or the degree of damage alleged? On the one hand, if, as defendants suggest, the differences in the specific means of harm is considered — that is, if at this stage the Court contemplates nuances of how those overcharges allegedly were accomplished — then plaintiffs may struggle to satisfy the factual component of CPLR 901 (a) (2). On the other hand, as plaintiffs note, to focus on potential idiosyncrasies within the class claims — distinctions that speak to damages, not to liability — at this juncture would potentially be to reward bad actors who execute a common method to damage in slightly different ways. * * *

Here the complaint addresses harm effectuated through a variety of approaches but within a common systematic plan … , and its class claims should not be dismissed at this juncture. Maddicks v Big City Props., LLC, 2019 NY Slip Op 07519, CtApp 10-22-19

DIRECTED VERDICT.

PLAINTIFF'S 'DENIAL OF A FAIR TRIAL' ACTION PURSUANT TO 42 USC 1983 SHOULD NOT HAVE BEEN DISMISSED BEFORE PLAINTIFF'S CASE WAS CLOSED; THE MOTION FOR A DIRECTED VERDICT WAS PREMATURE AND SHOULD NOT HAVE BEEN GRANTED, EVEN IF PLAINTIFF'S ULTIMATE SUCCESS WAS UNLIKELY; NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing Supreme Court, setting aside the verdict, and ordering a new trial, determined that the motion for a directed verdict should not have been granted prior to the close the plaintiff's case. Plaintiff had brought an action against the City of New York pursuant to 42 USC 1983 alleging he had not received a fair trial:

The denial of a fair trial claim is a stand alone cause of action (see e.g. Garnett v Undercover Officer C0039, 838 F3d 265, 278-279 [2d Cir 2016]), which should not have been dismissed prior to the conclusion of plaintiff's case in chief. CPLR 4401 permits a party to move for a directed verdict "after the close of the evidence presented by an opposing party with respect to such cause of action or issue." "[I]t is reversible error to grant a motion for a directed verdict prior to the close of the party's case against whom a directed verdict is sought" … , even if the ultimate success of a plaintiff's cause of action is unlikely … . Cromedy v City of New York, 2019 NY Slip Op 07527, First Dept 10-22-19

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, CHARTER SCHOOLS.

THE STATE UNIVERSITY OF NY BOARD OF TRUSTEES' CHARTER SCHOOL COMMITTEE DID NOT HAVE THE AUTHORITY TO CHANGE THE TEACHER CERTIFICATION REQUIREMENTS FOR TEACHERS IN CHARTER SCHOOLS (THIRD DEPT).

The Third Department, after finding the petitioners in one of the two actions had the capacity to sue and standing, determined the State University of New York Board of Trustees' Charter School Committee (the Committee) did not have the authority to promulgate regulations changing the teacher certification requirements for teachers in certain charter schools:

… [I]t is a basic principle of administrative law that an agency has only "those powers expressly conferred by its authorizing statute, as well as those required by necessary implication" … . Education Law § 355 (2-a) authorizes the Committee, "[n]otwithstanding any other provision of law, rule, or regulation to the contrary, . . . to promulgate regulations with respect to governance, structure and operations of [SUNY-authorized] charter schools." Respondents assert that the regulations fall within this statutory authorization because teacher licensure pertains to the "operation" of SUNY-authorized charter schools. In analyzing this claim, we need not defer to the Committee's interpretation of the Education Law, as "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" … . * * *

We … conclude that the inclusion of the word "operation" in Education Law § 355 (2-a) does not authorize the Committee to promulgate regulations pertaining to teacher licensure and certification. We further find that the regulations conflict with provisions of the Education Law that authorize the Commissioner to prescribe regulations governing the certification of teachers and that require most teachers in charter schools and pre-kindergartens to be certified in the same manner as other public school teachers … . The Committee therefore exceeded its authority in promulgating the regulations … . Matter of New York State Bd. of Regents v State Univ. of N.Y., 2019 NY Slip Op 07458, Third Dept 10-17-19

FULL FAITH AND CREDIT, INSURANCE LAW.

STAY IMPOSED BY A SOUTH CAROLINA COURT AS PART OF THE LIQUIDATION OF A SOUTH CAROLINA MEDICAL MALPRACTICE INSURANCE CARRIER WAS NOT ENTITLED TO FULL FAITH AND CREDIT IN A NEW YORK ACTION AGAINST DEFENDANTS INSURED BY THE INSOLVENT CARRIER (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Duffy, determined that the stay imposed by a South Carolina court after the medical malpractice carrier, Oceanus, was declared insolvent and dissolved was not entitled to full faith and credit in the New York actions against parties insured by Oceanus. Oceanus was not a party to the New York actions, and due process trumped the Uniform Insurers Liquidation Act (UILA). The opinion is comprehensive and the reasoning cannot be fairly summarized here:

Notwithstanding the goals of the UILA, for the reasons set forth herein, the principles of due process and the right of the plaintiffs to seek redress in the courts in New York for wrongs they allege occurred in New York mandate that the South Carolina order is not entitled to full faith and credit or comity by the courts in New York

in this and the related actions. Hala v Orange Regional Med. Ctr., 2019 NY Slip Op 07387, Second Dept 10-16-19

JUDGES, SUA SPONTE, FORECLOSURE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED DEFENDANTS AN EXTENSION OF TIME TO ANSWER IN THIS FORECLOSURE ACTION, RELIEF WHICH WAS NOT REQUESTED BY DEFENDANTS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, granted relief in this foreclosure action which was not requested by the defendant:

"The court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" … . Here, the defendants did not request an extension of time to answer, and the Supreme Court's determination to, sua sponte, grant that relief was an improvident exercise of discretion. Indeed, to extend the time to answer the complaint, a defendant must generally provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action … . Here, the only excuse offered by the defendants for their default was the plaintiff's alleged failure to properly serve them, which excuse was rejected by the Supreme Court. Further, the defendants did not proffer any potentially meritorious defense to the action. We note also that the court's sua sponte determination to extend the time within which the defendants had to answer the complaint is fundamentally inconsistent with its determination to deny that branch of the defendants' motion which was to vacate the judgment of foreclosure and sale. Since the judgment determined the action and the rights of the parties, allowing the defendants to interpose an answer was without practical import. U.S. Bank N.A. v Halevy, 2019 NY Slip Op 07438, Second Dept 10-16-19

JURISDICTION, FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE RELINQUISHED JURISDICTION WITHOUT CONSIDERING THE INCONVENIENT FORUM FACTORS MANDATED BY THE DOMESTIC RELATIONS LAW; MOTHER HAD RELOCATED TO FLORIDA WITH THE CHILDREN AND FATHER WAS SEEKING TELEPHONE AND ELECTRONIC CONTACT WITH THE CHILDREN (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court should not have relinquished jurisdiction without considering the factors required by statute before finding New York to be an inconvenient forum. Mother had relocated to Florida with the children and father brought a petition and an order to show cause alleging mother refused to allow telephone and electronic contact with the children:

… [M]other's counsel made a request for dismissal of the petition on jurisdictional grounds pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (see Domestic Relations Law art 5-A [hereinafter UCCJEA]). The father opposed this request, advising that he had not received the notice of limited appearance and did not know that jurisdiction would be contested at the initial appearance. Following a brief discussion with counsel, Family Court granted the mother's request, dismissed the petition, denied the relief sought in the order to show cause and directed all further proceedings to take place in Florida. The father appeals.

Family Court erred in summarily relinquishing jurisdiction. As the court acknowledged, it had exclusive continuing jurisdiction over the matter pursuant to the UCCJEA … . Although a court may decline to exercise such jurisdiction upon finding that New York is an inconvenient forum and another state is a more appropriate forum … , such a determination must be made in accord with the statutory directives established within Domestic Relations Law § 76-f. The statutory requirements were not met here. Matter of Cody RR. v Alana SS., 2019 NY Slip Op 07471, Third Dept 10-17-19

JURISDICTION, FAMILY LAW.

HEARING NECESSARY TO DETERMINE WHETHER FAMILY COURT HAS SUBJECT MATTER JURISDICTION IN THIS FAMILY OFFENSE PROCEEDING; JURISDICTION DEPENDS ON THE NATURE OF THE RELATIONSHIP BETWEEN THE PARTIES (SECOND DEPT).

The Second Department, reversing Family Court, determined a hearing was necessary on whether the court had subject matter jurisdiction for the petition seeking an order of protection:

… [T]he petitioner commenced this proceeding pursuant to Family Court Act article 8 seeking an order of protection against Cynthia J. Brock. The petitioner alleged, inter alia, that she and Brock were in an intimate relationship in that the petitioner was the paternal great grandmother of Brock's child, and that she and Brock had "lived together in the past." The petitioner further alleged that although her grandson and the child had moved out of her home a month earlier, Brock continued to routinely drop off the child at the petitioner's home after Brock's parental access time with the child, and used these opportunities to threaten, abuse, and annoy the petitioner. The petitioner also alleged that Brock telephoned the child on a daily basis, and verbally harassed the petitioner on the phone. Subsequently, Brock made an application to dismiss the petition for lack of subject matter jurisdiction on the ground that the relationship between her and the petitioner did not qualify as an "intimate relationship" within the meaning of Family Court Act § 812(1)(e). The Family Court granted the application and dismissed the petition.

The Family Court is a court of limited subject matter jurisdiction, and "cannot exercise powers beyond those granted to it by statute"… . Pursuant to Family Court Act § 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain proscribed criminal acts that occur "between spouses or former spouses, or between parent and child or between members of the same family or household" … . For purposes of Family Court Act article 8, "members of the same family or household" include, inter alia, "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time" … . Expressly excluded from the ambit of "intimate relationship" are "casual acquaintance[s]" and "ordinary fraternization between two individuals in business or social contexts" … . Beyond those delineated exclusions, what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e) is determined on a case-by-case basis … . Relevant factors include "the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the

persons; and the duration of the relationship … . Matter of Hamrahi v Brock, 2019 NY Slip Op 07781, Second Dept 10-30-19

JURISDICTION, LONG-ARM.

FRENCH COMPANY WHICH MANUFACTURED ELEVATOR BRAKES FOR SALE TO OTHER MANUFACTURERS DID NOT HAVE SUFFICIENT CONTACTS WITH NEW YORK TO CONFER JURISDICTION IN THIS ELEVATOR MALFUNCTION CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined New York did not have jurisdiction over a French company (Warner Europe) which manufactured elevator brakes in this elevator-malfunction case. The French company sold the brakes to other companies which incorporated the brakes into their elevator A.C. drives:

Warner Europe established that it does not sell the elevator brakes it manufactures in France to any customers in New York or contract with any other company to distribute its elevator brakes to customers in New York. Instead, it sells its elevator brakes as component parts to other manufacturers which incorporate them into A.C. drives, which are then sold to other manufacturers that incorporate the A.C. drives containing the elevator brakes into elevator systems. Warner Europe also established that it has no knowledge of the end users of the elevator brakes, and that it does not sell replacement elevator brakes or component parts to the end-user customers who purchased the elevators into which they were incorporated. Warner Europe also established that its products were neither sold nor advertised online. Finally, Warner Europe showed that it has no real or personal property in New York, no registered agent or telephone number in New York, and no bank or investment account in New York, and that it does not advertise in New York. Thus, the record does not support a finding that Warner Europe knew or reasonably should have known that its manufacture and sale of elevator brakes would have a direct consequence in New York… such that long-arm jurisdiction could be exercised.

Moreover, the plaintiffs and the defendants that opposed Warner Europe's motion to dismiss did not make a showing of a "sufficient start" to warrant the denial of the motion … . There is no basis to allow discovery to be conducted on the issue of personal jurisdiction since the opposing parties did not allege any facts which, if proven, would establish that Warner Europe may be subject to personal jurisdiction in New York … . Grandelli v Hope St. Holdings, LLC, 2019 NY Slip Op 07386, Second Dept 10-16-19

JURISDICTION, NOTICE OF APPEARANCE.

DEFENDANTS' COUNSEL WAIVED ANY LACK OF PERSONAL JURISDICTION BY FILING A NOTICE OF APPEARANCE, NOTWITHSTANDING THE STATEMENT IN THE NOTICE THAT JURISDICTIONAL DEFENSES WERE NOT WAIVED (SECOND DEPT).

The Second Department determined defendants' counsel had waived any lack of personal jurisdiction in this foreclosure action by filing a notice of appearance, notwithstanding the statement in the notice that jurisdictional defenses were not waived:

" The filing of a notice of appearance in an action by a party's counsel serves as a waiver of any objection to personal jurisdiction in the absence of either the service of an answer which raises a jurisdictional objection, or a motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction'" … .

Here, the defendants' counsel filed a notice of appearance dated February 25, 2015, and the defendants did not move to dismiss the complaint insofar as asserted against them on the ground of lack of personal jurisdiction at that time, or assert lack of personal jurisdiction in a responsive pleading … . It is immaterial that the notice of appearance, in addition to requesting that all papers in the action be served on the defendants' counsel, stated that "[t]he Defendants do not waive any jurisdictional defenses by reason of the within appearance." This language is not a talisman to protect the defendants from their failure to take timely and appropriate action to preserve their defense of lack of personal jurisdiction. The defendants did not move to dismiss the complaint insofar as asserted against them on the ground of lack of personal jurisdiction until January 2016, more than 10 months after filing the notice of appearance. Under these circumstances, the defendants waived any claim that the Supreme Court lacked personal jurisdiction over them in this action. JP Morgan Chase Bank, N.A. v Jacobowitz, 2019 NY Slip Op 07773, Second Dept 10-30-19

JURISDICTION, TRUSTS AND ESTATES, FORECLOSURE.

THE DEATH OF A PARTY TO THIS FORECLOSURE ACTION AFFECTED THE MERITS OF THE CASE; SUPREME COURT DID NOT HAVE JURISDICTION TO DETERMINE DEFENDANT'S MOTION AND THE RELATED ORDER IS A NULLITY; THE APPEAL THEREFORE MUST BE DISMISSED (THIRD DEPT).

The Third Department determined the death of a party to this foreclosure proceeding deprived the court of jurisdiction. Therefore the court should not have considered defendant's motion and the related order was a nullity:

In 2003, defendant Sharon A. Harris (hereinafter defendant) and defendant Marion D. Schubnel executed a note in favor of plaintiff that was secured by a mortgage on real property located in Albany County. Defendant and Schubnel owned the subject property as joint tenants with rights of survivorship. …

… [P]laintiff commenced this mortgage foreclosure action against defendant and Schubnel, among others. Defendant served an answer but Schubnel failed to do so. In November 2016, Schubnel died. In July 2017, defendant moved for leave to serve an amended answer and, as relevant here, sought to add a statute of limitations affirmative defense. In an amended order entered November 2017, Supreme Court granted the motion and sua sponte dismissed the complaint as time-barred. …

The death of a party generally stays an action until a personal representative is substituted for the deceased party … . Strict adherence to this rule, however, is unnecessary where a party's demise does not affect the merits of the case … .

It is true that defendant, as the surviving joint tenant, obtained Schubnel's interest in the subject property upon Schubnel's death. Notwithstanding this transfer of interest, Schubnel's estate can still be held liable for any deficiency in the event that a sale of the subject property fails to satisfy the debt. Indeed, the complaint specifically requests that such relief be granted should it be necessary … . In the absence of a substitution of Schubnel, a discontinuance of the action insofar as asserted against Schubnel or a representation by plaintiff that it would be waiving its right to seek a deficiency judgment against Schubnel, the death of Schubnel affects the merits of the case … . Because an automatic stay was in effect upon Schubnel's death, Supreme Court was without jurisdiction to consider defendant's motion and, therefore, the November 2017 amended order is a nullity … . Wells Fargo Bank, N.A. v Schubnel, 2019 NY Slip Op 07462, Third Dept 10-17-19

JURY TRIAL, RIGHT TO.

PLAINTIFF WAIVED ITS RIGHT TO A JURY TRIAL BY INCLUDING A REQUEST FOR EQUITABLE RELIEF; ONCE WAIVED THE RIGHT CANNOT BE REVIVED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff had waived its right to a jury trial by including a request for equitable relief and, once waived, the right cannot be revived:

Plaintiff has waived its right to a jury trial. When, as here, the complaint either joins legal and equitable causes of action arising out of the same alleged wrong or seeks both legal and equitable relief, there is a waiver of a plaintiff's right to a jury trial … . Plaintiff's sixth cause of action for a permanent injunction sounds in equity, is not incidental to the remaining claims and as a result of its inclusion, it can no longer be said that money damages would afford a complete remedy … . Furthermore, "[o]nce the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement or withdrawal of the equitable claim(s) will not revive the right to trial by jury" … . Errant Gene Therapeutics, LLC v Sloan-Kettering Inst. for Cancer Research, 2019 NY Slip Op 07226, First Dept 10-8-19

MUNICIPAL LAW, SEQRA, ARTICLE 78.

PLAINTIFF DID NOT HAVE STANDING TO CONTEST THE TOWN'S NEGATIVE DECLARATION PURSUANT TO SEQRA RE THE PROPOSED SEWER DISTRICT; PLAINTIFF'S ACTION SHOULD HAVE BEEN BROUGHT AS AN ARTICLE 78 AND WAS THEREFORE TIME-BARRED; PLAINTIFF DID NOT HAVE A FIRST AMENDMENT RIGHT TO A RESPONSE TO HIS COMPLAINT TO THE TOWN RE THE SEWER DISTRICT (THIRD DEPT).

The Third Department determined plaintiff did not have standing to contest the negative declaration issued by the town under the State Environmental Quality Review Act (SEQRA) because the sewer construction approved by the town was 15 miles from plaintiff's property. The Third Department further found that plaintiff's actions should have been brought as an Article 78 and therefore was time-barred, and his First Amendment arguments,

alleging the town should have responded to his "Petition for the Redress of Grievances Regarding the Proposed [sewer district]." were meritless:

Plaintiff does not have standing to raise the SEQRA claims. "In land use matters especially, [the Court of Appeals] ha[s] long imposed the limitation that the plaintiff, for standing purposes, must show that [he or she] would suffer direct harm, injury that is in some way different from that of the public at large [and] [t]his requirement applies whether the challenge to governmental action is based on a SEQRA violation, or other grounds" … .Plaintiff does not reside in the Town. Although his homestead apparently straddles the Town line such that 1.2 acres of his land is situated in the Town, his property is located outside of — and approximately 15 miles away from — the sewer district. Moreover, plaintiff's status as a taxpayer, by itself, does not grant him standing to challenge the establishment of the sewer district … . …

Plaintiff's SEQRA challenge is also time-barred. Regardless of how a plaintiff may label or style his or her claim, courts must look to the core of the underlying claim and the relief sought and, if the claim could have been properly addressed in the context of a CPLR article 78 proceeding, a four-month statute of limitations will apply … . * * *

… [T]he First Amendment does not "guarantee[] a citizen's right to receive a government response to or official consideration of a petition for redress of grievances" … . Schulz v Town Bd. of the Town of Queensbury, 2019 NY Slip Op 07667, Third Dept 10-24-19

MUNICIPAL LAW, NOTICE OF CLAIM.

42 USC 1983 IS NOT SUBJECT TO THE MUNICIPAL-LAW NOTICE OF CLAIM REQUIREMENT; THE NOTICE OF THE MALICIOUS PROSECUTION ACTION WAS TIMELY; THE PETITION TO FILE LATE NOTICES OF CLAIM FOR THE REMAINING STATE LAW CLAIMS SHOULD NOT HAVE BEEN GRANTED; THE EXCUSES WERE NOT VALID AND THE VILLAGE DID NOT HAVE TIMELY NOTICE OF THE CLAIMS SIMPLY BY VIRTUE OF THE POLICE REPORT AND THE INVOLVEMENT OF A POLICE OFFICER (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, over a partial dissent, determined: (1) the 42 USC 1983 action was not subject to the notice of claim requirement of the General Municipal Law; the notice

of claim for the malicious prosecution cause of action was timely because the limitations period began when the underlying charges were dismissed; and (3) the petition for leave to file late notices of claim for the state law discrimination, false arrest, abuse of process, excessive force, failure to intervene, denial of access to the courts, intimidation and intentional infliction of emotional distress actions should not have been granted:

The petitioner's explanation that the counsel who represented him during the criminal proceeding did not advise him of the notice of claim requirement and that he did not learn of the requirement until … he retained his current attorney to represent him in a potential civil action did not constitute a reasonable excuse for his failure to timely serve the Village with a notice of claim for the remaining state law claims … . The petitioner's ignorance of the law does not constitute a reasonable excuse … . Moreover, the petitioner's assertion that he knowingly delayed commencing any action against the Village while the criminal charges were pending due to unsubstantiated claims of fear and intimidation does not constitute a reasonable excuse … . …

The petitioner did not establish that the Village acquired actual knowledge of the essential facts constituting the remaining state law claims within 90 days after they arose or a reasonable time thereafter. "Generally, knowledge of a police officer or of a police department cannot be considered actual knowledge of the public corporation itself regarding the essential facts of a claim" … . "[F]or a report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the public corporation" … . Here, the involvement of a Village police officer in arresting the petitioner did not, without more, establish that the Village acquired actual knowledge of the essential facts constituting the petitioner's remaining state law claims within 90 days following their accrual or a reasonable time thereafter … . Matter of Nunez v Village of Rockville Ctr., 2019 NY Slip Op 07783, Second Dept 10-30-19

NECESSARY PARTY.

THE ESTATE OF A JOINT TENANT WAS NOT A NECESSARY PARTY IN THE FORECLOSURE ACTION BECAUSE THE INTEREST IN THE PROPERTY PASSED UPON DEATH, THE ESTATE'S MOTION TO INTERVENE PROPERLY DENIED (SECOND DEPT).

The Second Department determined the estate's motion to intervene in a foreclosure proceeding was properly denied. When Sydney Burt, a joint tenant with right of survivorship, died, his interest in the property subject to the foreclosure action passed to the joint tenant, Karyn Berkley, and not to Sydney's estate. Therefore the estate did not have the right to intervene in the foreclosure:

… [T]he issue of whether the proposed intervenor was a necessary party in the action was determined on the merits by the Supreme Court in its order … , wherein it denied the defendant's motion, inter alia, to dismiss the complaint for failure to join the proposed intervenor. Thus, the parties had a full and fair opportunity to litigate the issue of whether the proposed intervenor was a necessary party. … [W]e agree with the Supreme Court's determination to deny intervention. New York defines a joint tenancy as "an estate held by two or more persons jointly, with equal rights to share in its enjoyment during their lives, and creating in each joint tenant a right of survivorship" … . "The right of survivorship has been defined as a right of automatic inheritance' where, upon the death of one joint tenant, the property does not pass through the rules of intestate succession, but is automatically inherited by the remaining tenant" … . Therefore, when one joint tenant dies, the other joint tenants automatically inherit the property. This is in marked contrast to tenancies in common which allow a decedent's share of property to pass under the rules of inheritance … . Thus, here, upon the Sydney Burt's death, his interest in the property did not pass to his estate, the proposed intervenor; rather, it automatically passed to the remaining joint tenants, the defendant and Berkley. Therefore, the proposed intervenor was not a necessary party and did not have the right to intervene in the foreclosure action. PHH Mtge. Corp. v Burt, 2019 NY Slip Op 07802, Second Dept 10-30-19

NEGLECT TO PROSECUTE, FORECLOSURE.

JUDGE WAS WITHOUT AUTHORITY TO DISMISS THE FORECLOSURE COMPLAINT; ISSUE HAD NOT BEEN JOINED AND THERE WAS NO EVIDENCE PLAINTIFF FAILED TO APPEAR AT A SCHEDULED CONFERENCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Supreme Court was without authority to dismiss (sua sponte) the complaint in this foreclosure action because (1) issue had not been joined, and (2) there was no evidence plaintiff failed to appear at a conference:

CPLR 3216(b)(1) states that no dismissal should be made under this statute unless issue has been joined. "A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met" … . Here, none of the defendants submitted an answer to the complaint and, thus, issue was never joined (see CPLR 3216[b][1] …). "Since at least one precondition set forth in CPLR 3216 was not met here, the Supreme Court was without power to dismiss the action pursuant to that statute" … . …

Contrary to the defendant's contention, where, as here, a party "appeared as scheduled, [22 NYCRR 202.27] provides no basis for the court to summarily dismiss the action" for failure to prosecute … . In general, "[t]he

procedural device of dismissing a complaint for undue delay is a legislative creation, and courts do not possess the inherent power to dismiss an action for general delay where the plaintiff has not been served with a 90-day demand to serve and file a note of issue pursuant to CPLR 3216(b) … . Bank of N.Y. v Harper, 2019 NY Slip Op 07378, Second Dept 10-16-19

PRIVILEGE, INSURANCE LAW.

INSURER'S ACCIDENT INVESTIGATION REPORT IS PRIVILEGED AND NOT DISCOVERABLE (FIRST DEPT).

The First Department, reversing Supreme Court, determined that an insurer's accident investigation report is privileged and not discoverable:

Documents in an insurer's claim file, including an accident investigation report, that were prepared for litigation against its insured are immune from disclosure (see CPLR 3101[d][2] …). Although documents in a first-party insurance action prepared in an insurer's ordinary course of business in investigating whether to accept or reject coverage are discoverable (see CPLR 3101[g] …), there is no indication that such documents are being protected here. In the absence of any demonstration of hardship by plaintiff, the insurer's accident investigation report remains privileged … . Dabo v One Hudson Yards Owner, LLC, 2019 NY Slip Op 07751, First Dept 10-29-19

REMOVAL, FAMILY COURT, CRIMINAL LAW.

JUDGE HAD THE AUTHORITY TO SEVER TWO COUNTS IN AN INDICTMENT AND REMOVE THE MATTER, INVOLVING A JUVENILE, TO FAMILY COURT; THE PEOPLE'S ARTICLE 78 SEEKING PROHIBITION DENIED AND DISMISSED (FIRST DEPT).

The First Department denied the People's Article 78 action seeking to vacate an order by the respondent judge severing two counts which had been combined in an indictment and removing the charges to Family Court. The People objected to removing the prosecution of a 16-year-old to Family Court. In order the facilitate the removal, respondent judge severed the two counts. The People unsuccessfully argued the judged did not have the authority to sever the counts, and therefore could not send the charges to Family Court:

"[T]he extraordinary remedy of prohibition lies only where there is a clear legal right, and only when a court . . . acts or threatens to act either without jurisdiction or in excess of its authorized powers in a proceeding over which it has jurisdiction" … . "Use of the writ is, and must be, restricted so as to prevent incessant interruption of pending judicial proceedings by those seeking collateral review of adverse determinations made during the course of those proceedings" … .

There is no merit in the People's contention that the court lacks the authority to sever charges that were joined in a single indictment. This argument would have validity in cases where charges were properly joinable in a single indictment. However, the law is clear that the determination of whether the charges were, in fact, properly joinable in the first instance, is a duty of the court that is not delegated to the prosecution or the grand jury.

The court has a duty to examine the indictment to determine whether joinder is proper pursuant to CPL 200.20(a) or (b). Notably, the People have not provided any precedent to support their position to the contrary. Courts routinely rule on the issue of whether charges in an indictment are properly joinable under CPL 200.20(2) and sever those charges that are not … .

While the People disagree with the court's finding that the … charges were not properly joinable under CPL 200.20(2)(b), determination of this issue is not before us in this article 78 proceeding. Rather, we are only asked, and we only have the authority, to determine whether the court acted without jurisdiction or in excess of its authority. Matter of Vance v Roberts, 2019 NY Slip Op 07358, First Dept 10-10-19

STANDING, FORECLOSURE.

BANK'S EVIDENCE OF STANDING DID NOT MEET THE CRITERIA OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT).

The Second Department, reversing Supreme Court. determined that the bank's motion for summary judgment should not have been granted because the evidence of standing submitted by the bank did not meet the requirements of the business records exception to the hearsay rule:

… [T]he plaintiff failed to meet its prima facie burden of establishing that it had standing …. The affidavits of Andrea Kruse, vice president of loan documentation for Wells Fargo Bank, N.A. (hereinafter Wells Fargo), the plaintiff's servicer, failed to lay the proper foundation under the business records exception to the hearsay rule to support her assertion that the note was transferred to the plaintiff's custodian prior to commencement of the

action and remained in the possession of the plaintiff's custodian at the time of commencement …. While, in attempting to rely upon the documentary evidence that was annexed to the motion, Kruse averred in her first affidavit that she reviewed the books and records regularly created, maintained, and kept by Wells Fargo, and in her second affidavit that she reviewed the books and records regularly created, maintained, and kept by the plaintiff, she did not attest that she was personally familiar with the plaintiff's or Wells Fargo's record-keeping practices and procedures, or that the plaintiff's records were incorporated into Wells Fargo's own records or routinely relied upon in its business … . US Bank Natl. Assn. v Hunte, 2019 NY Slip Op 07311, Second Dept 10-9-19

STATUTE OF LIMITATIONS, FORECLOSURE.

A LETTER INDICATING THE DEBT WOULD BE ACCELERATED IF THE ARREARS WERE NOT PAID DID NOT SERVE TO ACCELERATE THE DEBT IN THIS FORECLOSURE ACTION; DEFENDANT DID NOT DEMONSTRATE THE BANK FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment contending the bank's action was time barred and the bank failed to comply with RPAPL 1304 should have been denied. The 2010 letter from the bank which mentioned that the loan would be accelerated if the arreats were not paid did not serve to accelerate the debt. And defendant (Grella) did not demonstrate the bank failed to comply with the notice requirements of RPAPL 1304:

On or about December 12, 2010, the loan servicer sent Grella a notice of default which demanded payment of the arrears, and stated, in relevant part, that "[u]nless the payments on your loan can be brought current by January 11, 2011, it will become necessary to require immediate payment in full (also called acceleration) of your Mortgage Note. . . . If funds are not received by the above referenced date, we will proceed with acceleration." Thereafter, the note and the mortgage were assigned to the plaintiff. …

Contrary to Grella's contention, the language in the 2010 notice of default did not serve to accelerate the loan, as it "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" … . …

Here, as the moving party, Grella was required to affirmatively demonstrate that the plaintiff failed to strictly comply with the notice requirements of RPAPL 1304 … . Grella failed to make such a showing. HSBC Bank USA, N.A. v Grella, 2019 NY Slip Op 07388, Second Dept 10-16-19

STATUTE OF LIMITATIONS, CONTRACT LAW.

PLAINTIFF'S ACTION WAS NOT TIME-BARRED BECAUSE THE SIX-MONTH LIMITATION PERIOD IN THE SUBCONTRACT EXPIRED BEFORE SUIT COULD BE BROUGHT; THE TERMS OF THE ONE-YEAR LIMITATION PERIOD IN THE LABOR AND MATERIAL BOND CONFLICTED WITH THE REQUIREMENTS OF THE STATE FINANCE LAW; THE STATE FINANCE LAW CONTROLS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff-subcontractor's breach of contract action against the general contractor and the insurance company (Liberty Mutual) which issued the labor and material payment bond for the construction work should not have been dismissed, and plaintiff was entitled to summary judgment on its action against the general contractor. The Third Department held that the six-month statute of limitations in the subcontract and the one-year statute of limitations in the bond did not render the actions time-barred:

"A 'limitation period' that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim" … . The conflict in the subcontractor agreement between the limitation period and the payment provisions had the effect of nullifying plaintiff's breach of contract claim; thus, the six-month limitation period is unreasonable and unenforceable, and Supreme Court should not have dismissed plaintiff's complaint as time-barred … . * * *

State Finance Law § 137 (4) (b) sets forth a later accrual date than the payment bond, providing that "no action on a payment bond furnished pursuant to [State Finance Law § 137] shall be commenced after the expiration of one year from the date on which the public improvement has been completed and accepted by the public owner" (emphasis added). The provisions of State Finance Law § 137 govern bonds furnished pursuant to that statute, and, although parties may agree to expand the statute's protections, they may not limit them … . As the accrual date set forth in the first part of the contractual limitation provision conflicts with State Finance Law § 137 (4) (b), the second part of the provision must be given effect, and the bond agreement must be deemed to be amended to provide for the accrual date set forth in the statute … . The record does not reveal the date on which the project

was accepted … for this purpose. Accordingly, there are issues of fact as to when plaintiff's cause of action against Liberty Mutual accrued and whether it is time-barred, and summary judgment dismissing the complaint against Liberty should not have been granted … . Digesare Mech., Inc. v U.W. Marx, Inc., 2019 NY Slip Op 07668, Third Dept 10-24-19

VERDICT, MOTION TO SET ASIDE.

VERDICT AWARDING ZERO DAMAGES FOR PAST PAIN AND SUFFERING IN THIS POLICE EXCESSIVE-FORCE CASE SET ASIDE; NEW TRIAL ORDERED UNLESS THE PARTIES STIPULATE TO A $200,000 DAMAGES AWARD (FIRST DEPT).

The First Department determined the verdict awarding plaintiff zero damages for past pain and suffering should have been set aside in this police-excessive-force case (42 USC 1983). The court ordered a new trial unless the parties stipulated to a $200,000 damages award:

Plaintiff sustained injuries when a New York City police officer smashed him in the nose with a bullet-proof shield after entering his apartment to execute a search warrant. After a trial, the jury found that the officer violated plaintiff's rights under the Fourth Amendment to the U.S. Constitution by using excessive force while arresting him and that the excessive force was a substantial factor in causing his injuries. However, the jury awarded plaintiff no damages for pain and suffering. * * *

However, we find that the jury's failure to award damages for past pain and suffering is contrary to a fair interpretation of the evidence and deviates materially from what would be reasonable compensation (CPLR 5501[c]; …). The undisputed evidence establishes that plaintiff was in pain the first night after being struck, that for about two weeks after the incident his broken nose and orbital bone fractures were "kind of rough," that he could only breathe through his mouth, that he had to get medication, that he suffered "really bad" headaches, and that he required reconstructive nasal surgery as a result of his injuries. Shimukonas v City of New York, 2019 NY Slip Op 07147, First Dept 10-3-19

WITNESSES, FAMILY LAW.

TRANSCRIPT OF FAMILY COURT ACT 1028 HEARING SHOULD NOT HAVE BEEN USED AS A REPLACEMENT FOR AN ABUSE-NEGLECT FACT-FINDING HEARING BECAUSE THE PROOF REQUIREMENTS ARE DIFFERENT AND BECAUSE THERE WAS NO FINDING THAT THE WITNESS AT THE 1028 HEARING WAS UNAVAILABLE (SECOND DEPT).

The Second Department, reversing Family Court, determined the transcript of the Family Court Act 1028 hearing (seeking the quick return of a child temporarily removed pending a fact-finding hearing) should not have been used to replace the abuse/neglect fact-finding hearing because the proof requirements are different:

Family Court Act § 1028 permits a parent to apply for the return of a child who has been temporarily removed from the custody of the parent pending the fact-finding hearing on the issue of abuse or neglect … . "[A] section 1028 hearing is intended to give a parent an opportunity for a prompt reunion with the child, pending trial" … . In analyzing an application for a child's return under Family Court Act § 1028, a court must engage in a test balancing the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal … . Section 1028 hearings, however, were not intended to replace fact-finding hearings, as the evidentiary standards are different. Family Court Act § 1046 provides that "only competent, material and relevant evidence may be admitted" at a fact-finding hearing, whereas evidence "[i]n a dispositional hearing and during all other stages of a proceeding under" Family Court Act article 10 need only be "material and relevant" … . A determination on an application pursuant to section 1028 "should not be taken as any indication of what ultimate determination should be made by the Family Court as to [a] petition alleging abuse and neglect" … . "At a fact-finding hearing, any determination that a child is an abused or neglected child must be based on a preponderance of the evidence" … .

CPLR 4517, which governs the admissibility of prior testimony in a civil action, is applicable here … , as the Family Court Act does not prescribe the issue of whether testimony from a prior hearing pursuant to Family Court Act article 10 may be admitted into evidence on the petitioner's direct case in a fact-finding hearing. Pursuant to CPLR 4517(a)(3), prior trial testimony of a witness may be used by any party for any purpose against another party if the court finds that such witness is dead or otherwise unavailable. In this matter, the Family Court made no such finding.

Here, the Family Court should not have admitted into evidence at the fact-finding hearing transcripts of testimony from the hearing conducted pursuant to Family Court Act § 1028. As ACS now correctly concedes, the caseworker's testimony at the prior hearing, which included hearsay statements, actually formed the basis of the

court's neglect finding at the subsequent fact-finding hearing. Matter of Louie L. V. (Virzhiniya T. V.), 2019 NY Slip Op 07592, Second Dept 10-23-19

WITNESSES, NOTICE.

THE TRIAL COURT PROPERLY PRECLUDED DEFENDANTS FROM CALLING PLAINTIFF'S TREATING PHYSICIANS AS WITNESSES IN THIS POLICE EXCESSIVE FORCE CASE BECAUSE OF INADEQUATE NOTICE AND THE TRIAL COURT PROPERLY ACCEPTED PLAINTIFF'S REDACTIONS OF THE MEDICAL RECORDS BECAUSE DEFENDANTS FAILED TO SUGGEST THEIR OWN REDACTIONS (FIRST DEPT).

The First Department determined the trial court properly precluded the defendants to call plaintiff's (Walid's) treating physicians as witnesses and properly redacted plaintiff's medical records. Plaintiff, a teenager with autism, brought this action against police officers for assault, battery and use of excessive force. Defendants did not give timely notice of their wish to call the treating doctors and did not supply their own suggested redactions:

We find that, under the circumstances, the trial court did not improvidently exercise its discretion in precluding defendants from introducing testimony from Walid's treating doctors at Ferncliff Manor. Defendants failed to disclose any of these witnesses until four days before trial, after having previously affirmatively represented to the court that they did not intend to call any witnesses. The court and plaintiffs relied on this representation in estimating the length of trial and selecting a jury. In view of the trial court's broad authority to control its courtroom, it was not unreasonable for the court to decline to add these witnesses and prolong the trial when a jury had already been chosen (twice) based on certain representations about its length … .

The trial court also did not improvidently exercise its discretion in allowing only a limited subset of Walid's records from Ferncliff Manor to be admitted into evidence. It is clear that these records required at least some redaction, including to eliminate double hearsay … and propensity evidence … . Because defendants refused to propose any redactions, after having been given ample opportunities to do so, the trial court was justified in adopting plaintiffs' proposed redactions instead. Even if defendants are correct that the complete records contain additional relevant evidence that should not have been excluded, having failed to propose any redactions of their own, defendants cannot now complain that the records should have been redacted less heavily. Walid M. v City of New York, 2019 NY Slip Op 07739, First Dept 10-29-19