# NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
April 2020

An Organized Compilation of the Summaries of Selected Decisions Addressing Civil Procedure Released by Our Appellate Courts in April 2020 and Posted on the New York Appellate Digest Website. Click on the Entries in the Table of Contents to Go to the Summaries. Click on the Citations in the Summaries to Go to the Full Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header of Any Page to Return There.

# Contents

Table of Contents

## ABANDONMENT, FORECLOSURE.

## PLAINTIFF DID NOT HAVE AN EXCUSE FOR FAILING TO MOVE FOR A DEFAULT JUDGMENT FOR FOUR YEARS; THE ACTION WAS DISMISSED AS ABANDONED WITH NO NEED TO CONSIDER WHETHER THE ACTION WAS MERITORIOUS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's failure to timely seek a default judgment in this foreclosure action required the action to be dismissed as abandoned. Plaintiff's failure to offer an adequate excuse mandated dismissal without considering whether plaintiff had a meritorious action:

… [T]he Supreme Court should have granted that branch of the defendant's cross motion which was pursuant to CPLR 3215(c) to dismiss the complaint insofar as asserted against her as abandoned. CPLR 3215(c) provides, inter alia, that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, . . . unless sufficient cause is shown why the complaint should not be dismissed." "To establish sufficient cause,' the party opposing dismissal must demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action" … .

Here, the plaintiff provided no explanation for the almost four-year delay after the defendant defaulted in 2011 before it filed a request for judicial intervention in February 2015 requesting a residential mortgage foreclosure settlement conference. Under such circumstances, the Supreme Court should have found that the plaintiff had not demonstrated a reasonable excuse for its delay in seeking a default judgment … . Since the plaintiff failed to proffer a reasonable excuse, this Court need not consider whether the plaintiff demonstrated a potentially meritorious action … . Flushing Bank v Sabi, 2020 NY Slip Op 02461, Second Dept 4-29-20

## ARBITRATION, WAIVER OF RIGHT TO, CONTRACT LAW.

## RESPONDENT WAIVED HIS RIGHT TO ARBITRATE HIS TERMINATION PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT BY BRINGING A BREACH OF CONTRACT ACTION SEEKING THE SAME RELIEF ON THE SAME GROUNDS, AS WELL AS DAMAGES (THIRD DEPT).

The Third Department, reversing Supreme Court, determined respondent (Ferreira) had waived his right to arbitrate his discharge from employment as a teacher pursuant to the collective bargaining agreement (CBA) because he sought an action at law seeking the same relief on the same grounds, as well as damages:

"Generally, when addressing waiver, courts should consider the amount of litigation that has occurred, the length of time between the start of the litigation and the arbitration request, and whether prejudice has been established" … . Moreover, the Court of Appeals has found no waiver where the ultimate objective of multiple procedures is the same, but the grounds urged for relief are discrete … .

Here, Ferreira waived his right to arbitrate because he chose to pursue an action at law asserting virtually the same grounds for relief and remedies sought in the arbitration. His notice of claim, alleging breach of contract, was filed approximately three months prior to his request for arbitration. An action was thereafter commenced, which was still pending at the time of oral argument, and, "[b]y commencing an action at law involving arbitrable issues, [Ferreira] waived whatever right [he] had to arbitration" … . Although use of litigation to preserve the status quo while awaiting arbitration does not effectuate waiver, Ferreira did not merely seek an equitable relief; rather, he sought monetary damages and other affirmative relief as a result of the termination of his employment and petitioner's alleged violation of the CBA … . Matter of New Roots Charter Sch. (Ferreira), 2020 NY Slip Op 02223, Third Dept 4-9-20

## DEFAULT, ATTORNEYS, FAMILY LAW.

## BECAUSE MOTHER'S ATTORNEY APPEARED MOTHER WAS NOT IN DEFAULT; FAMILY COURT'S REFUSAL TO ADMIT DOCUMENTARY EVIDENCE OFFERED BY MOTHER'S ATTORNEY DEPRIVED MOTHER OF DUE PROCESS (SECOND DEPT).

The Second Department, reversing Family Court, determined mother was not in default because her attorney appeared and the court's refusing to admit documentary evidence offered by mother's attorney deprived mother of her right to due process of law:

The mother failed to appear … when continued fact-finding on the permanent neglect petition was scheduled, and an adjournment was granted. When the mother failed to appear on the next hearing date, … the mother's counsel stated that she would be participating in the proceeding on the mother's behalf and sought to admit into evidence certain documents. … [T]he mother was, therefore, not in default with respect to the fact-finding hearing … .

The Family Court's refusal to permit the mother's counsel to admit into evidence the documentary evidence on behalf of the mother based upon the mother's failure to appear … , violated the mother's right to due process. " A parent has a right to be heard on matters concerning her [or his] child and the parent's rights are not to be disregarded absent a convincing showing of waiver'" … . Matter of Amira W.H. (Tamara T.H.), 2020 NY Slip Op 02264, Second Dept 4-9-20

## DISCONTINUANCE, STIPULATION OF, FORECLOSURE.

## A STIPULATION OF DISCONTINUANCE OF THE 2008 FORECLOSURE ACTION DID NOT MENTION DE-ACCELERATION OF THE DEBT OR THE ACCEPTANCE OF FUTURE INSTALLMENT PAYMENTS; THEREFORE THE DEBT WAS NOT DE-ACCELERATED AND THE SUBSEQUENT FORECLOSURE ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that a stipulation of a discontinuance of the 2008 foreclosure action did not de-accelerate the debt. The foreclosure action was therefore time-barred:

An action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR 213[4]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due … . Once a mortgage debt is accelerated, however, the statute of limitations begins to run on the entire debt … . "A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" … . * * *

Contrary to the plaintiff's contention, Bank of New York's execution of the stipulation of discontinuance of the 2008 action did not, by itself, constitute an affirmative act revoking acceleration … . Notably, the stipulation was silent on the issue of acceleration and did not otherwise indicate that the plaintiff would accept installment payments … . Moreover, a notice of de-acceleration must be "clear and unambiguous to be valid and enforceable" … . Here, the notices of intent and 90-day notices which were sent prior to commencement of this action were completely silent as to de-acceleration. Bank of N.Y. Mellon v Yacoob, 2020 NY Slip Op 02451, Second Dept 4-29-20

## DISCONTINUE, MOTION TO.

## MOTION TO VOLUNTARILY DISCONTINUE THE FORECLOSURE ACTION WAS PROPERLY GRANTED WITHOUT PREJUDICE (THIRD DEPT).

he Third Department determined plaintiff's motion to voluntarily discontinue the foreclosure action (CPLR 3217(b)) was properly granted without prejudice. The litigation was still in the early stages and, although defendant had interposed a counterclaim, defendant did not move for a default judgment within a year and thereby abandoned the counterclaim:

Although this action had been pending for approximately three years at the time of the motion, the litigation itself remained in its early stages. In addition, the record confirms that defendant never sought default nor moved to compel discovery. Furthermore, the parties had not yet participated in the mandatory settlement conference (see CPLR 3408). Indeed, determination of plaintiff's motion was the first occasion where Supreme Court was called upon to intervene in this action. Although defendant alleged that she would sustain prejudice if her discovery went unanswered, Supreme Court correctly determined that there was no evidence of prejudice to defendant or other improper consequences flowing from the discontinuance, as the parties can engage in necessary discovery in a subsequent foreclosure action … . …

… [T]he interposition of a counterclaim in and of itself is not dispositive with respect to the discontinuance. The discontinuance must work a particular prejudice against a defendant. Here, defendant is not prejudiced, as she will be able to assert her counterclaim in a subsequent foreclosure action. Although defendant argues that "one's home is an interest that is unquantifiable," she will be able to continue to reside in the mortgaged premises pending another action and will have the same rights available to her as were in the discontinued action … . Green Tree Servicing LLC v Shiow Fei Ju, 2020 NY Slip Op 02307, Third Dept 4-16-20

## INJUNCTION, LANDLORD-TENANT, CONTRACT LAW.

## PLAINTIFF LANDLORD HAD AN ADEQUATE REMEDY AT LAW FOR AN ALLEGED BREACH OF THE LEASE BY THE TENANT; PLAINTIFF'S ALLEGED LOSS OF GOODWILL WAS NOT APPLICABLE; THE BALANCE OF EQUITIES FAVORED THE TENANT; THE PRELIMINARY INJUNCTION WAS NOT WARRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined a preliminary injunction was not warranted in this dispute over a lease. Defendant store leased space in plaintiff mall. The lease provided the store could terminate the lease before the end of the term if its gross sales were below a threshold. The store sought to terminate the lease on that ground, but the mall alleged the store's gross sales did not fall below the threshold. The lease included a liquidated damages provision. The majority concluded the liquidated damages provision provided a remedy at law, the loss of goodwill was not applicable and the balance of the equities favored the store, not the mall. So the preliminary injunction should not have been granted:

… [T]he lease contains a liquidated damages provision that entitles plaintiff to certain money damages if defendants prematurely vacate the premises and cease operations. The lease also contains an integration clause stating that the lease is "the entire and only agreement between the parties." Thus, because the lease specifically provides that plaintiff is entitled to certain money damages in the event that defendants vacate the premises in breach of the agreement—the very injury that serves as the predicate for plaintiff's action—we conclude that plaintiff has an adequate remedy at law and, moreover, that plaintiff has not suffered irreparable harm because the liquidated damages clause was intended as the sole remedy for such a breach … .

We disagree with our dissenting colleagues that plaintiff established a likelihood of irreparable injury from the loss of goodwill that would occur if defendants were to cease operations by prematurely terminating the lease. The "loss of goodwill and damage to customer relationships, unlike the loss of specific sales, is not easily quantified or remedied by money damages" … and may warrant a finding of irreparable injury in cases such as those involving unfair competition tort claims … , the proposed demolition or alteration of the premises … , or the issuance of a Yellowstone injunction, in which it is a tenant, not the landlord, who seeks to enjoin the termination of a lease … . No such scenario is implicated here and, moreover, as already noted, the specific injury complained of by plaintiff was accounted for by the terms of the lease agreement. …

… [W]we conclude that the harm defendants will suffer if forced to keep their 6,000-square-foot store open against their will is greater than the injury plaintiff will suffer from the loss of one tenant in the mall, especially

because plaintiff may still recoup its loss via the liquidated damages provision. Eastview Mall, LLC v Grace Holmes, Inc., 2020 NY Slip Op 02447, Fourth Dept 4-24-20

---

## PLEADINGS, DISMISS, MOTION TO.

## THE TORTIOUS INTERFERENCE WITH CONTRACT AND DEFAMATION CAUSES OF ACTION WERE NOT REFUTED BY DOCUMENTARY EVIDENCE AND WERE ADEQUATELY PLED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined that plaintiff had stated causes of action for tortious interference with contract and defamation and the actions should not have been dismissed on either the "documentary evidence" or "failure to state a cause of action" ground:

Turning first to CPLR 3211 (a) (1), a motion to dismiss pursuant to this provision "will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" … . What may be deemed "documentary evidence" for purposes of this subsection is quite limited. "Materials that clearly qualify as documentary evidence include documents . . . such as mortgages, deed[s], contracts, and any other papers, the contents of which are essentially undeniable" … . Here, Supreme Court relied upon the statements taken during defendant's investigation, as well as its non-harassment policy. As plaintiff argues, even sworn affidavits have been held inadequate to meet this statutory standard, and defendant's submissions here do not qualify as documentary evidence … . …

The grounds for dismissal under CPLR 3211 (a) (7) are also strictly limited; the court is not allowed to render a determination upon a thorough review of the relevant facts adduced by both parties, but rather is substantially more constrained in its review, examining only the plaintiff's pleadings and affidavits … . …

To establish a claim for tortious interference with a contract, the plaintiff must allege "the existence of [his or her] valid contract with a third party, [the] defendant's knowledge of that contract, [the] defendant's intentional and improper procuring of a breach, and damages" … . Here, plaintiff's complaint alleged that a valid contract existed between plaintiff and the distributor, that defendant intentionally spread "false, specious and salacious accusations against [p]laintiff," and that such conduct "had no good faith or justifiable cause" and did not "protect an economic interest." Liberally construing these allegations, as we must, taking all of the alleged facts as true, and giving plaintiff every favorable inference … , they do not fail to state a claim.

The defamation claim will ultimately require "proof that the defendant made 'a false statement, published that statement to a third party without privilege, with fault measured by at least a negligence standard, and the statement caused special damages or constituted defamation per se'" … . Here, the complaint sets forth the particular words complained of and the damages plaintiff allegedly sustained … . Carr v Wegmans Food Mkts., Inc., 2020 NY Slip Op 02141, Third Dept 4-2-20

.

---

## PLEADINGS, DECEPTIVE BUSINESS PRACTICES.

## GENERAL BUSINESS LAW 349 DECEPTIVE BUSINESS PRACTICES CAUSE OF ACTION IN THE CONTEXT OF A RENT STABILIZATION LAW (RSL) RENT-OVERCHARGE SUIT WAS PROPERLY DISMISSED (CT APP).

The Court of Appeals, over a partial dissent, determined the General Business Law 349 cause of action alleging deceptive business practices in the context of the Rent Stabilization Law (RSL) rent-overcharge suit was properly dismissed:

… General Business Law … , section 349 prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" … . We have held that this statute "cannot fairly be understood to mean that everyone who acts unlawfully, and does not admit the transgression, is being deceptive'" within the meaning of section 349 … . For purposes of this appeal, we assume without deciding that a claim may lie under General Business Law § 349 based upon a landlord's alleged misrepresentation to the public that an apartment was exempt from rent regulation following deregulation in violation of the Rent Stabilization Law. Here, however, plaintiffs alleged only that defendants failed to admit that they violated the Rent Stabilization Law in deregulating plaintiffs' apartments—three of which were, in fact, never deregulated—rather than any affirmative conduct that would tend to deceive consumers. Inasmuch as plaintiffs failed to allege more than "bare legal conclusions" … regarding the existence of consumer-oriented, deceptive acts … , their General Business Law claim was properly dismissed. Collazo v Netherland Prop. Assets LLC, 2020 NY Slip Op 02128, CtApp 4-2-20

## REOPEN HEARING, AUTHORITY TO, FAMILY LAW.

## FAMILY COURT SHOULD HAVE REOPENED THE NEGLECT HEARING WHEN MOTHER ARRIVED AT COURT SHORTLY AFTER SUMMATIONS (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should have reopened the neglect hearing when mother arrived just after summations:

The Family Court conducted a fact-finding hearing over the course of several days, during which the mother was present, and the maternal grandmother and a DSS caseworker testified. On the fifth day of the hearing, the mother was late in arriving to court because she allegedly was traveling by bus from Georgia to New York, and the bus was delayed. The mother's counsel notified the court of the mother's transportation issue, and of her intention to testify, and requested an adjournment. The court denied the adjournment request and directed that the hearing proceed as scheduled. The mother arrived shortly after summations, but the court did not reopen the hearing to afford the mother the opportunity to testify.

Following the hearing, the Family Court found that the mother neglected the child. …

A finding of neglect constitutes "a permanent and significant stigma" which might indirectly affect the mother's status in future proceedings … . The Family Court has the authority to reopen a Family Court Act article 10 proceeding to allow a party to present additional testimony at a fact-finding hearing … .

Under the circumstances of this case, the Family Court should have exercised its discretion to reopen the fact-finding hearing to afford the mother the opportunity to present her case. Matter of Katie P.H. (Latoya M.), 2020 NY Slip Op 02265, Second Dept 4-9-20

## SERVICE, PROOF OF, FAMILY LAW.

## PETITIONER HAD THE BURDEN TO PROVE RESPONDENT WAS SERVED; THE SUPPORT MAGISTRATE REVERSED THE BURDEN OF PROOF; NEW HEARING ORDERED (SECOND DEPT).

The Second Department, ordering a new hearing, determined the Support Magistrate did not apply the correct standard to whether respondent (father) was served with the petition seeking an order of filiation and child support. The burden of proof of proper service was on mother:

The Support Magistrate did not apply the correct standard in weighing the evidence adduced at the hearing. "It is well established that it is the plaintiff [or the petitioner] who bears the ultimate burden of proving by preponderating evidence that jurisdiction over the defendant [or the respondent] was obtained" … . The plaintiff or the petitioner may sustain that burden, inter alia, by introducing the affidavit of service and the testimony of the process server, or evidence demonstrating that the process server is unavailable or that diligent efforts were made to locate the process server to no avail … . Here, the mother, as the party who commenced this proceeding, was the party who bore the burden of proving that jurisdiction was obtained over the father. At the conclusion of the hearing, however, the Support Magistrate denied that branch of the father's motion which was pursuant to CPLR 5015(a)(4) to vacate the order of support, finding that he failed to credibly meet his burden of proving that he was not served with the petition … . Matter of Kathleen T.K. v Eric C.S., 2020 NY Slip Op 02266, Second Dept 4-9-20

## SUBPOENA, MOTION TO QUASH.

## WHETHER THE SCHOOL PRINCIPAL RECEIVED COMPETENT REPRESENTATION AT HER DISCIPLINARY PROCEEDINGS BEFORE THE NYC DEPARTMENT OF EDUCATION WAS RELEVANT TO HER DECERTIFICATION PROCEEDINGS BEFORE THE NYS DEPARTMENT OF EDUCATION; THEREFORE THE MOTION THE QUASH THE SUBPOENA SEEKING THE ATTORNEY'S TESTIMONY SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that the motion to quash a subpoena seeking an attorney's (Guerra's) testimony in a teacher decertification proceeding should not have been granted. The attorney was seeking employment with the NYC Department of Education (NYCDOE) at the time she was representing the respondent school principal (Klingsberg) in disciplinary proceedings brought by the NYCDOE. The issue of whether respondent received competent representation in the disciplinary proceedings was relevant to whether those proceedings should be given collateral estoppel effect in the New York State Department of Education (SED) teacher decertification proceedings:

"[A] subpoena will be quashed only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry" … . The party moving to quash bears "the burden of establishing that the subpoena should be [quashed] under such circumstances" … . * * *

… [W]hether Klingsberg was competently represented at that prior proceeding so as to warrant giving preclusive effect to its factual findings is very much in issue in this decertification proceeding and, given that Guerra has firsthand knowledge regarding her representation of Klingsberg at that prior proceeding, it cannot be said that "the information sought [from Guerra] is utterly irrelevant" to the decertification inquiry … . Rather, Guerra's testimony is highly relevant to whether collateral estoppel will be applied in the pending decertification proceeding. For this reason, petitioners have not satisfied their burden of proof on their motion to quash the subpoena … . Matter of Board of Educ. of the City Sch. Dist. of the City of N.Y. v New York State Dept. of Educ., 2020 NY Slip Op 02140, Third Dept 4-2-20

## VERDICT, MOTION TO SET ASIDE.

## EXTRINSIC COLLATERAL DOCUMENTARY EVIDENCE SHOULD NOT HAVE BEEN ADMITTED TO IMPEACH DEFENDANT DOCTOR'S CREDIBILITY IN THIS MEDICAL MALPRACTICE TRIAL; DEFENDANT'S MOTION TO SET ASIDE THE $400,000 VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this medical malpractice action, determined the defendant doctor's motion to set aside the plaintiff's $400,000 verdict should have been granted. The trial court should not have allowed extrinsic documentary evidence on collateral matters to impeach defendant's credibility:

"A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise" … . "In considering such a motion, [t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and must look to his [or her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision'" … .

Here, the Supreme Court should not have permitted the plaintiff to introduce extrinsic documentary evidence concerning collateral matters solely for the purpose of impeaching the defendant's credibility … . In view of the importance of the defendant's testimony and the emphasis given to the improperly admitted credibility evidence by the plaintiff's counsel during summation, the errors were sufficiently prejudicial to warrant a new trial … . Rudle v Shifrin, 2020 NY Slip Op 02487, Second Dept 4-29-20