NEW YORK APPELLATE DIGEST, LLC

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October 26-30, 2020

Summaries of Decisions Released the Week of October 26-30, 2020. The Entries in the Table of Contents Link to the Decision-Summaries Which Link to the Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There.

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CIVIL PROCEDURE, EXTENSION OF TIME TO SERVE.

EVEN IF PLAINTIFF BANK DID NOT SATISFY THE GOOD CAUSE STANDARD FOR AN EXTENSION OF TIME TO SERVE DEFENDANT IN THIS FORECLOSURE ACTION, PLAINTIFF WAS ENTITLED TO AN EXTENSION IN THE INTEREST OF JUSTICE PURSUANT TO CPLR 306-b (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff bank's motion to extend the time for service of the complaint in the interest of justice should have been granted. The Third Department noted that defendant had waived the statute of limitations defense by not asserting it in an answer or a motion to dismiss and Supreme Court should not have cancelled the mortgage because defendant did not request that relief:

… [D]efendant contends … that her default was properly vacated due to lack of personal jurisdiction. Plaintiff does not raise any argument as to whether service was properly effectuated upon defendant or whether a traverse hearing should have been granted. … Plaintiff instead argues that it was entitled to an extension of time under CPLR 306-b to cure any service defects.

To that end, a plaintiff may be granted an extension of time to serve process upon a defendant "upon good cause shown or in the interest of justice" … . Even if we agreed with defendant that plaintiff failed to satisfy the good cause standard of CPLR 306-b, we find that plaintiff established its entitlement to an extension of time in the interest of justice. "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" … . The record discloses that, approximately one month after commencing this action, plaintiff made numerous attempts to serve defendant at the address provided on the mortgage documents. Plaintiff likewise cross-moved for an extension of time to cure any service defects approximately one month after defendant raised the issue of improper service. Furthermore, defendant does not argue, nor does the record indicate, that she would suffer any prejudice if an extension of time was granted. In view of the foregoing, and taking into account that plaintiff demonstrated the merits of its claim, plaintiff's cross motion, to the extent that it sought an extension of time to serve process in the interest of justice, should have been granted … . U.S. Bank Natl. Assn. v Kaufman, 2020 NY Slip Op 06184, Third Dept 10-29-20

CIVIL PROCEDURE, FAILURE TO PROSECUTE.

THE 90-DAY NOTICE WAS DEFECTIVE; THEREFORE THE ACTION SHOULD NOT HAVE BEEN DISMISSED PURSUANT TO CPLR 3216 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the action should not have dismissed pursuant to CPLR 3216 because the 90-day notice was defective:

On November 20, 2012, the Supreme Court issued a certification order which, inter alia, certified the matter for trial and directed the plaintiff to file a note of issue within 90 days. The order provided that "[i]f plaintiff does not file a note of issue within 90 days this action is deemed dismissed without further order of the Court. (CPLR 3216)." The plaintiff failed to file a note of issue, and the action was ministerially dismissed, without further notice to the parties. …

An action cannot be dismissed pursuant to CPLR 3216(a) "unless a written demand is served upon 'the party against whom such relief is sought' in accordance with the statutory requirements, along with a statement that the 'default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him [or her] for unreasonably neglecting to proceed'" … . …

The certification order, which purported to serve as a 90-day notice pursuant to CPLR 3216, was defective as it did not state that the plaintiff's failure to comply with the demand would serve as a basis for the Supreme Court, on its own motion, to dismiss the action for failure to prosecute … . Moreover, it is evident from the record that the action was ministerially dismissed without a motion or notice to the parties, and there was no order of the court dismissing the action … . HSBC Bank USA, N.A. v Arias, 2020 NY Slip Op 06108, Second Dept 10-28-20

CONTRACT LAW, GENERAL BUSINESS LAW.

BREACH OF CONTRACT COUNTERCLAIM AGAINST HOME IMPROVEMENT CONTRACTOR PROPERLY DECIDED IN HOMEOWNERS' FAVOR; THE CONTRACT DID NOT COMPLY WITH GENERAL BUSINESS LAW 771(1)(b) AND THE CONTRACTOR'S PERFORMANCE WAS DEFICIENT (THIRD DEPT).

The Third Department determined defendants' breach of contract counterclaim against plaintiff contractor was correctly decided in defendants' favor after a bench trial and the damages were proper (with the exception of one mistake). The Third Department noted that the home improvement contract did not comply with General Business Law 771 (1) (b):

The record reflects, and plaintiff does not dispute, that he failed to comply with General Business Law § 771 (1) (b), which requires that a home improvement contract include, among other things, provisions as to "[t]he approximate dates, or estimated dates, when the work will begin and be substantially completed, including a statement of any contingencies that would materially change the approximate or estimated completion date." Inasmuch as the contract failed to include these statutorily required provisions, we find that Supreme Court properly dismissed plaintiff's breach of contract claim as "a contractor cannot enforce a contract that fails to comply with General Business Law § 771" … . …

The credible testimony at trial established that the work performed by plaintiff was deficient … .

"[T]he proper measure of damages for breach of a construction contract is the cost to either repair the defective construction or complete the contemplated construction" … . Lapenna Contr., Ltd. v Mullen, 2020 NY Slip Op 06183, Third Dept 10-29-20

CRIMINAL LAW, INCLUSORY CONCURRENT COUNTS.

COURSE OF SEXUAL CONDUCT COUNT VACATED AS AN INCLUSORY CONCURRENT COUNT OF PREDATORY SEXUAL ASSAULT AGAINST A CHILD (FIRST DEPT).

The First Department noted that the course of sexual conduct conviction must be vacated as an inclusory concurrent count of predatory sexual assault against a child. People v Encarnacion, 2020 NY Slip Op 06067, First Dept 10-27-20

CRIMINAL LAW, JUSTIFICATION DEFENSE.

THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE IN THIS ASSAULT AND RESISTING ARREST CASE; DEFENDANT KICKED AND FLAILED AS HE WAS SUBDUED BY MORE THAN EIGHT POLICE OFFICERS (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the jury should have been instructed on the justification defense:

Defendant's request to charge justification, with regard to his kicking and flailing as officers tried to subdue and arrest him, should have been granted … . Penal Law § 35.27 permits a defendant to claim justification where there is a reasonable view of the evidence that he or she is the victim of excessive police force … . When a defendant requests such a charge, the trial court "must view the record in the light most favorable to the defendant and determine whether any reasonable view of the evidence would permit the factfinder to conclude that the defendant's conduct was justified." … Viewed in the light most favorable to the defense, the testimony and video evidence show that after defendant resisted police efforts to handcuff him, approximately eight additional officers joined in a struggle, punching and tazing defendant, and the police lieutenant used a baton to roll defendant's Achilles tendon. These facts warranted a justification charge. People v Banyan, 2020 NY Slip Op 06060, First Dept 10-27-20

CRIMINAL LAW, MOTION TO VACATE CONVICTION.

THE MOTION TO VACATE DEFENDANT'S CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DENIED WITHOUT HOLDING A HEARING; THE RECORD WAS NOT SUFFICIENT FOR DIRECT APPEAL AND THE MOTION PAPERS RAISED QUESTIONS REQUIRING A HEARING (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to vacate his conviction on ineffective assistance grounds should not have been denied without holding a hearing. The record was not sufficient for a direct appeal on the issue, and the motion raised ineffective assistance questions requiring a hearing:

Defendant's motion, alleging ineffective assistance of counsel in various respects, should not have been denied on the ground that the trial record is sufficient to permit appellate review (CPL 440.10[2][b]). The trial record does not establish whether counsel's alleged deficiencies in handling suppression and trial issues were based on legitimate trial strategy. Moreover, the motion was supported by motion counsel's affirmation detailing his conversation with trial counsel, which raised serious questions about counsel's performance as to several matters. Furthermore, the court improvidently exercised its discretion to the extent that it denied the motion, without granting a hearing, based on CPL 440.30(4)(d) … . As noted, motion counsel's affirmation recounted a conversation with trial counsel that tended to support some of the ineffectiveness claims. Motion counsel also averred that trial counsel ultimately refused to submit an affirmation in support of the motion. Under the circumstances, the motion court should have granted a hearing to enable trial counsel to be subpoenaed to testify or otherwise present evidence explaining whether there were strategic or other reasons for his decisions … . People v McCray, 2020 NY Slip Op 06219, First Dept 10-29-20

CRIMINAL LAW, SENTENCING.

DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A PERSISTENT VIOLENT FELONY OFFENDER BECAUSE HE COMMITTED HIS SECOND OFFENSE BEFORE HE WAS SENTENCED FOR HIS FIRST OFFENSE (SECOND DEPT).

The Second Department determined defendant should not have been sentenced as a persistent violent felony offender:

… [T]he defendant was improperly adjudicated a persistent violent felony offender, as he committed his second violent felony offense prior to the time when he was sentenced for his first felony conviction (Penal Law § § 70.08[1], 70.04[1][b][ii]; CPL 400.16 [2]; see People v Morse, 62 NY2d 205; People v Ritorto, 125 AD3d 896; People v Cooper, 245 AD2d 569) … . People v Robinson, 2020 NY Slip Op 06151, Second Dept 10-28-20

CRIMINAL LAW, SORA.

TEN POINTS SHOULD NOT HAVE BEEN ASSESSED FOR AN OLD MINOR OFFENSE IN PRISON, DEFENDANT'S RISK ASSESSMENT REDUCED TO LEVEL ONE (SECOND DEPT).

The Second Department, reducing defendant's risk level to level one, determined the 10 point assessment for unsatisfactory conduct in prison was not justified:

However, the record does not contain clear and convincing evidence to support the assessment of 10 points under risk factor 13, for "unsatisfactory" conduct while confined, based upon his conviction of the class A misdemeanor of promoting prison contraband in the second degree (Penal Law § 205.20). This conviction constituted the sole act of misconduct while confined cited by the People, and it occurred approximately four years before the SORA hearing, prior to the defendant's transfer to State prison. Since the defendant's misconduct was neither recent nor repeated, the assessment of points for that misdemeanor was not supported by the record … . People v Hernandez, 2020 NY Slip Op 06159, Second Dept 10-28-20

EMPLOYMENT LAW, NEGLIGENT HIRING AND RETENTION.

THE BUILDING MANAGING AGENT, WHO HIRED PEREZ, THE BUILDING SUPERINTENDENT, WAS NOT OBLIGATED TO DETERMINE WHETHER PEREZ, A REGISTERED SEX OFFENDER, HAD A CRIMINAL RECORD; THE BUILDING OWNER AND MANAGING AGENT, THEREFORE, WERE NOT LIABLE UNDER A NEGLIGENT HIRING AND RETENTION THEORY OR A RESPONDEAT SUPERIOR THEORY FOR PEREZ'S SEXUAL ASSAULT ON INFANT PLAINTIFF (FIRST DEPT).

The First Department, reversing Supreme Court, determined the building owner, Carpenter, and managing agent, Lemle, could not be held liable for the sexual assault on infant plaintiff by Perez, the building superintendent. The managing agent, who hired Perez, was not under an obligation to determine whether Perez, a registered sex offender, had a criminal record:

Carpenter hired managing agents, who employed Perez. Lemle was the managing agent on the relevant date. However, no issue of fact exists as to whether Lemle can be held liable for Perez's negligent hiring or retention because the record is devoid of evidence that Lemle had knowledge of Perez's propensity to commit a violent act … . The fact that Perez was a registered sex offender does not avail plaintiffs, as, in the absence of knowledge of any facts that would cause a reasonable person to question a person's background, an employer is under no duty to inquire whether an employee has been convicted of a crime … . The imposition of such a duty is a matter for the Legislature. There is no evidence that, prior to the incident in question, Perez ever did anything that should have indicated to his employer that he had a propensity to commit sexual abuse or any other crimes. Further, that Perez falsified identification records that he submitted for payroll purposes is of no moment, since the paperwork on its face would not have caused a reasonable person to question its veracity. Nor can Lemle be held vicariously liable for Perez's conduct because the conduct was not in furtherance of Lemle's business and was outside the scope of Perez's employment … . Samoya W. v 3940 Carpenter Ave., LLC, 2020 NY Slip Op 06218, First Dept 10-29-20

ENVIRONMENTAL LAW, STANDING.

ALTHOUGH THE SEQRA REVIEW OF THE PROPOSED MODIFICATION OF A LANDFILL WAS PROPERLY DONE, SUPREME COURT SHOULD NOT HAVE DETERMINED THAT NEARBY RESIDENTS DID NOT HAVE STANDING TO CONTEST THE RULING (THIRD DEPT).

Although the Third Department determined the Department of Environmental Conservation (DEC) had properly conducted its State Environmental Quality Review Act (SEQRA) review of the proposed modification of a landfill, the petition by nearby residents should not have been denied on the ground that the petitioners did not have standing to contest the DEC ruling:

… [A]t least some of the petitioners will suffer distinct environmental harm under the circumstances presented in these proceedings. For instance, although one might expect the visual impact of the landfill expansion to be widespread, DEC specifically found that the impact would be limited and that the areas where the individual petitioners live and/or maintain recreation facilities would be among the few having a "generally unobstructed" view of the landfill. Many of the individual petitioners confirmed that they can see the landfill from their residences, explained how they are personally impacted by the sights, sounds, smells and dust generated by operations there, and further articulated how those impacts will worsen if the landfill expansion goes forward … . Moreover, the Halfmoon petitioners alleged that those impacts will impair the use and enjoyment of Halfmoon's public park, trails and boat launches across the river, while one of the individual Halfmoon petitioners described how she was intimately involved in the development of a trail system and boat launch along the river and was similarly concerned by those impacts … . Standing rules are not to be applied in a manner so restrictive that agency actions are insulated from judicial review and, in our view, the foregoing was sufficient to establish that at least some of the petitioners in each proceeding will suffer environmental impacts different from those experienced by the general public so as to afford standing to sue … . Matter of Town of Waterford v New York State Dept. of Envtl. Conservation, 2020 NY Slip Op 06180, Third Dept 10-29-20

EVIDENCE, NEGLIGENCE.

HEARSAY EVIDENCE TO WHICH NO OBJECTION WAS MADE CAN BE CONSIDERED BY THE COURT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS HIT AND RUN ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department noted that hearsay evidence to which no objection was raised may be considered by the court. Here the hearsay was a GPS document which purported to show the location of a vehicle owned by defendant AT&T submitted to demonstrate its vehicle was not involved in the hit and run accident:

… Supreme Court denied the motion on the ground that the GPS document was inadmissible inasmuch as it was submitted to the court without the proper foundation and there was no information as to its reliability. AT & T appeals.

"[I]n civil cases, inadmissible hearsay admitted without objection may be considered and given such probative value as, under the circumstances, it may possess" … . The Supreme Court should not have denied AT & T's motion on the ground that the GPS document was inadmissible since the plaintiff never raised that issue in opposition to the motion … .

In any event, the other evidence submitted by AT & T established, prima facie, that AT & T's vehicle was not involved in the subject accident … . In opposition, the plaintiff failed to raise a triable issue of fact as to the identity of the driver or owner of the vehicle which struck him … . Costor v AT&T Servs., Inc., 2020 NY Slip Op 06098, Second Dept 10-28-20

FORECLOSURE, NOTICE, STANDING.

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH RPAPL 1304 AND DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION; PLAINTIFF'S MOTION FOR SUMMARY SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate it met the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 and the bank did not demonstrate it had standing the bring the action:

… [T]he plaintiff failed to submit an affidavit of mailing or proof of first-class mailing by the United States Postal Service evidencing that it properly mailed notice to the defendant pursuant to RPAPL 1304. Instead, the plaintiff relied on an affidavit of Sherry Benight, who was employed as a document control officer for Select Portfolio Servicing, Inc. (hereinafter SPS), which began servicing the subject loan on the plaintiff's behalf on July 15, 2015, as well as copies of the purported notices, dated July 22, 2013. Although one of the notices contained a first-class mail 10-digit barcode, the plaintiff submitted no evidence that the letter was actually sent by first-class mail more than 90 days prior to commencement of the action. In her affidavit, Benight stated that she could confirm that the notice was sent to the defendant on July 22, 2013. However, Benight did not have personal knowledge of the purported mailing. Further, since she did not aver that she was familiar with the mailing practices and procedures of Bank of America, N.A., the entity that purportedly sent the notices, she did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed … . To the extent that Benight relied upon a screenshot of a TrackRight Transaction Report, she failed to establish how or when the report was created, that it was made in the regular course of business, or that it was created soon after the notices were purportedly mailed to the defendant … . …

The plaintiff also attempted to establish standing through the submission of Benight's affidavit, but this also was insufficient. Benight asserted that the original note was delivered to the plaintiff on September 7, 2004, and that the plaintiff had since remained in possession of the note. Benight, however, did not have personal knowledge of the plaintiff's receipt of the note, did not attest that she had personal knowledge of the plaintiff's business practices and procedures, and also did not submit any admissible business records to show that the plaintiff possessed the note at the time this action was commenced … . Bank of N.Y. Mellon v Porfert, 2020 NY Slip Op 06083, Second Dept 10-28-20

INSURANCE LAW, DISCLAIMER OF COVERAGE.

ALTHOUGH INSURANCE LAW 3420(d)(2) REQUIRING TIMELY NOTICE OF THE DISCLAIMER OF INSURANCE COVERAGE DOES NOT APPLY TO THIS BREACH OF CONTRACT (AS OPPOSED TO A PERSONAL INJURY) ACTION, THE DISCLAIMERS WERE UNTIMELY UNDER COMMON LAW WAIVER AND ESTOPPEL PRINCIPLES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant insurance companies' disclaimers of coverage of damages associated with the insured's breach of contract were not timely. The insured county was found to have breached a contract and was assessed nearly $11,000,000 in damages:

Contrary to the County's contention, while Insurance Law § 3420(d)(2) imposes strict requirements on an insurer to give timely written notice if it is disclaiming liability or denying coverage for death or bodily injury arising out of an accident, "[w]here, as here, the underlying insurance claim does not arise out of an accident involving bodily injury or death, Insurance Law § 3420 and its heightened requirements do not apply" … . Instead, an insurer's delay in disclaiming coverage "should be considered under common-law waiver and/or estoppel principles" … . …

Here, the County proffered evidence that * * * [the innsurers] did not respond [for] 6 months and 17 months, respectively, after they were notified of the subject loss. County of Suffolk v Ironshore Indem., Inc., 2020 NY Slip Op 06099, Second Dept 10-28-20

LIEN LAW, GARAGEKEEPER'S LIEN.

PETITIONER, THE OWNER OF A LEASED CAR DAMAGED IN AN ACCIDENT, SOUGHT A DECLARATION THAT THE RESPONDENT REPAIR SHOP'S GARAGEKEEPER'S LIEN WAS NULL AND VOID ALLEGING IT DID NOT AUTHORIZE THE REPAIR; ALTHOUGH THE NOTICE OF THE SALE TO PAY OFF THE LIEN DID NOT COMPLY WITH THE LIEN LAW, THE PETITION SHOULD NOT HAVE BEEN GRANTED BASED UPON EVIDENCE SUBMITTED IN SURREPLY (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the petition, brought by the owner of a leased vehicle damaged in an accident, seeking a declaration that the respondent repair shop's garagekeeper's lien was null and void because it did not authorize the repair, should not have been granted. Although the notice of the sale to pay off the lien did not comply with the Lien Law, evidence submitted by the petitioner in suureply should not have been considered. Therefore the petition should not have been granted on the merits and respondent repair shop should have been allowed to submit an answer:

Accepting that respondent attempted "with due diligence" to personally serve the notice upon petitioners within the county where the lien arose, however, the notice was not sent via "certified mail, return receipt requested, and by first-class mail" as required to accomplish service under Lien Law § 201 … . Those service requirements are meant "to insure that [owners] have an adequate opportunity to reclaim their vehicles" … and, inasmuch as a garagekeeper's lien is a statutory creation in derogation of common law, the failure to comply with them renders service defective … . Accordingly, in view of respondent's failure to serve the notice in the manner required by the Lien Law, the time in which to commence this proceeding challenging the lien never began to run … . …

Supreme Court did abuse its discretion, however, in rebuffing respondent's request to serve an answer and instead granting the petition on the merits. There was nothing to show that respondent was not a registered repair shop during the relevant period, and respondent asked petitioners to review a vehicle lease agreement that it believed conferred actual authority upon [the lessee] to authorize repairs on [petitioner's] behalf … . Petitioners instead provided that agreement for the first time in their surreply papers, a belated attempt to introduce new factual information to which respondent could not respond and that should have been rejected … . Matter of Daimler Trust v R&W Auto Body, Inc., 2020 NY Slip Op 06187, Third Dept 10-29-20

LIEN LAW, MORTGAGES.

PLAINTIFF ENTITLED TO AN EQUITABLE LIEN ON REAL PROPERTY WHICH WAS IDENTIFIED BUT NOT DESCRIBED IN THE MORTGAGE WHICH HAD BEEN ASSIGNED TO PLAINTIFF (SECOND DEPT).

The Second Department determined plaintiff bank was entitled to an equitable lien on real property. The mortgage secured by the property had been assigned to plaintiff but the mortgage did not include a description of the property:

… [T]he plaintiff commenced the instant action seeking, inter alia, an equitable mortgage on the property. The complaint noted that the mortgage failed to include a description of the property, and thus that the plaintiff's security interest in the property was imperiled. …

"New York law allows the imposition of an equitable lien if there is an express or implied agreement that there shall be a lien on specific property" … . "While [a] court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation, it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances" … .

Here, the documentary evidence submitted by the plaintiff sufficiently established the existence of the loan, the intent that it be secured by the property, and the debtor's obligation to satisfy the debt by a date certain … . U.S. Bank N.A. v Alleyne, 2020 NY Slip Op 06166, Second Dept 10-28-20

MEDICAL MALPRACTICE, CONTINUOUS TREATMENT.

QUESTIONS OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE RENDERED THE MEDICAL MALPRACTICE ACTION TIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact about whether the continuous treatment applied such that the action was not barred by the statute of limitations:

… [T]he plaintiffs raised a question of fact as to whether [defendant's] postoperative treatment of the patient, including rehabilitative therapy, wound care, and pain management, constituted a continuation of the course of treatment for the condition which originally gave rise to the alleged medical malpractice … . …

… [T]he plaintiffs raised a question of fact as to whether the [the rehabilitation center's] postoperative treatment of the patient, which included rehabilitative therapy, wound care, and pain management treatment through January 2015, constituted a continuation of the course of treatment for the condition which originally gave rise to the alleged medical malpractice … . Wright v Southampton Hosp., 2020 NY Slip Op 06170, Second Dept 10-28-20

REAL PROPERTY LAW, EASEMENTS.

A SUBSEQUENT DEED INCLUDING THE EASEMENT WAS A VALID CORRECTION DEED; THE STRANGER TO THE DEED RULE DID NOT APPLY BECAUSE THE DEEDS WITH THE EASEMENT CAME FROM THE SAME GRANTOR; THE EASEMENT WAS THEREFORE VALID AND DEFENDANTS SHOULD NOT HAVE BEEN ENJOINED FROM CLEARING IT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a deed was correction deed which included an easement not mentioned in the prior deed. The Second Department also held that the "strange to the deed" rule did not apply because the deeds with the easement came from the same grantor. Therefore the easement was enforceable and defendants should not have been enjoined from clearing trees and other obstructions from the walkway:

… [A]lthough the 1972 deed does not use the phrase "correction deed" or similar phrases, and it does not reference the 1971 deed or the prior conveyance, the 1972 deed is a deed of correction that superseded the 1971 deed … . * * *

We disagree with the Supreme Court's determination that the easement was void ab initio under the stranger to the deed rule … . … Since the dominant Lots … and the servient … shared a common grantor at the time the reservation was made, the stranger to the deed rule does not apply … . Garson v Tarmy, 2020 NY Slip Op 06104, Second Dept 10-28-20

TRUSTS AND ESTATES.

PETITION SEEKING TRANSFER OF REAL PROPERTY FROM DECEDENT TO PETITIONER BY REFORMATION OF THE DEED OR A CONSTRUCTIVE TRUST, AS WELL AS THE DISTRIBUTION OF TRUST ASSETS TO DECEDENT'S GRANDCHILDREN, AS OPPOSED TO DECEDENT'S SURVIVING DESCENDANTS, PROPERLY DENIED (THIRD DEPT).

The Third Department determined Surrogate's Court properly denied the petition which sought proceeds from the sale of real property in decedent's name and a distribution from a trust for the educational expenses for decedent's grandchildren:

According to the petition, petitioner had contributed funds to purchase the lots and paid all expenses associated therewith. Petitioner requested either reformation of the deeds or the imposition of a constructive trust. In the second proceeding, petitioner sought a decree authorizing a distribution from decedent's testamentary trust to pay for the educational expenses of the grandchildren. …

[Re: reformation of the deed for the real property,] [g]iven that petitioner did not establish, or even allege, that there was fraud involved, she failed to establish unilateral mistake where the showing of fraud is required … . To claim that there was mutual mistake, it must be established that "the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" … . Here, petitioner failed to show that there was an oral agreement that the vacant lots would be owned as tenants by the entirety … . …

[Re: a constructive trust for the real property,] … although there was a confidential relationship between petitioner and decedent due to their marital status, the record does not reveal that there was a promise that the two would jointly own the four vacant lots, that petitioner transferred monies to purchase the properties in reliance of that promise or that decedent's enrichment was unjust as a result … . …

Petitioner asserts that the word "use" supports her claim that decedent intended to provide the trustees with broad discretion that allows the distribution of the trust to be used for the grandchildren's educational expenses. However, when gleaning decedent's intent from the entirety of the will, the word "use" does not give unbridled discretion to the trustees to distribute the income for such purpose. Rather, when considering that the will provides that decedent's descendants who survive petitioner receive the remainder of the trust at the time of her death, it may be gleaned that it was not decedent's intent that the trust provide for the grandchildren's educational expenses during petitioner's lifetime … . Matter of Husisian, 2020 NY Slip Op 06188, Third Dept 10-29-20

WORKERS' COMPENSATION.

CLAIMANT'S FAILURE TO SUBMIT MEDICAL RECORDS TO THE EMPLOYER PRIOR TO THE HEARING REQUIRED PRECLUSION OF THE RECORDS; HOWEVER THE CASE SHOULD NOT HAVE BEEN CLOSED; CLAIMANT MAY REMEDY THE OMISSION (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the case should not have been closed because claimant failed to provide a copy of the medical records to the employer before the hearing, but rather the case should have been marked "no further action" which allows claimant to submit the medical records:

Pursuant to 12 NYCRR 300.2 (d) (4) (iv), copies of written reports of medical experts made based on a records review to be used for reference at a hearing must be filed with the Board and submitted to all other parties three days prior to the hearing. It is uncontested that the employer was not provided a copy of the report pursuant to the regulation and, therefore, the report was properly precluded … . …

As to the Board's decision to disallow the claim and close the case after rescinding the WCLJ's finding of prima facie medical evidence, it should be noted that if the WCLJ [Workers' Compensation Law Judge], in the first instance, had found that claimant had not proffered prima facie medical evidence, the WCLJ would have been required to have marked the case as "no further action" … . Claimant then would have been provided an opportunity to "submit additional information on an amended or other medical report, upon which submission the case shall be scheduled for another pre-hearing conference" … . Thus, under these circumstances, where there has been no finding by the WCLJ as to the establishment or disallowance of the claim, the Board's decision to find no admissible evidence of a causally-related death and close the case based solely upon the rescission of the WCLJ's finding of prima facie medical evidence was improper. Rather, the matter should now be marked as no further action, thereby providing claimant with an opportunity to proffer additional information to satisfy her burden of submitting prima facie medical evidence … . Matter of Barton v Consolidated Edison Co. of New York, Inc., 2020 NY Slip Op 06190, Third Dept 10-29-20