

NEW YORK APPELLATE DIGEST, LLC

A Collection of Condensed Decision-Summaries from the New York Appellate Digest Database Fleshing Out the Admissibility of Evidence Submitted or Arguments Made for the First Time in Reply in Summary Judgment Proceedings. The Entries Link to the Decisions on the Official New York Courts Website.
Copyright 2020 New York Appellate Digest, LLC

The Admissibility of Evidence Submitted or Arguments Made for the First Time in Reply in Summary Judgment Proceedings.
A Collection of Condensed Decision-Summaries from the New York Appellate Digest Database
Researched on December 11, 2020

APPEALS (REPLY-RELATED ISSUES)

A purely legal issue first raised in reply, here the fact that the action cannot be dismissed pursuant to CPLR 3216 because issue was not joined, which could not have been avoided if it had been raised below, can be considered on appeal.

[U.S. Bank N.A. v Ricketts, 2017 NY Slip Op 06475, Second Dept 9-13-17](#)

APPEALS (REPLY-RELATED ISSUES)

An issue first raised in defendant's reply affirmation is not properly before an appellate court on defendant's appeal.

[Anderson v Pena, 2014 NY Slip Op 07948, 1st Dept 11-18-14](#)

APPEALS (REPLY-RELATED ISSUES)

Dram Shop Act---police report attached to defendant's reply papers.

The bar argued the police report which included a description of the driver as "intoxicated" was inadmissible.

However the bar had submitted the report with its reply papers and thereby waived any objection to its admissibility.

The plaintiff, therefore, may rely on the report on appeal.

[Trigoso v Correa, 2017 NY Slip Op 03983, 2nd Dept 5-17-17](#)

APPEALS (REPLY-RELATED ISSUES)

FAILURE TO CERTIFY THE DEPOSITION TRANSCRIPTS COULD HAVE BEEN CURED IN REPLY HAD IT BEEN RAISED, REVERSED ON THAT GROUND

Plaintiff injured falling off exercise ball

The motion court denied defendant health club's motion for summary judgment because the deposition transcripts were not certified and therefore inadmissible, a ground not raised by the parties.

In reversing, the Second Department noted that, had the plaintiff raised the certification issue in opposition to defendant's motion, defendant could have submitted the certification in reply papers.

[Rosenblatt v St George Health & Racquetball Assoc LLC, 2014 NY Slip Op 02917, 2nd Dept 4-30-14](#)

EVIDENCE IN REPLY NOT CONSIDERED

NO OPPORTUNITY TO RESPOND

Medical Malpractice---new expert theory submitted in defense reply papers.

A new theory raised by the defense for the first time in reply papers should not have been considered because the plaintiffs did not have the opportunity to address it.

[Guido v Fielding, 2020 NY Slip Op 06391, First Dept 11-10-20](#)

ARGUMENT IN REPLY NOT CONSIDERED

NO OPPORTUNITY TO RESPOND

ARGUMENT SHOULD HAVE BEEN IN INITIAL MOTION PAPERS

Medical Malpractice---defendant hospital's argument that plaintiffs did not allege vicarious liability in the bill of particulars was raised for the first time in the hospital's reply papers.

The new argument or grounds raised for the first time in the reply papers should not have been considered by the court because the plaintiffs were not given the opportunity to respond in a surreply.

[Castro v Durban, 2018 NY Slip Op 03503, Second Dept 5-16-18](#)

EVIDENCE IN REPLY NOT CONSIDERED

NO OPPORTUNITY TO RESPOND

Garagekeeper's Lien---car owner's petition for a judgment declaring the lien null and void because the party who leased the car, not the petitioner-car-owner, authorized the repair.

Petitioner-car-owner submitted a contract with its surreply papers which purportedly was relevant to whether a lessee could authorize the repair.

The contract presented in surreply should not have been considered because the garage owner did not have a chance to respond to it.

[Matter of Daimler Trust v R&W Auto Body, Inc., 2020 NY Slip Op 06187, Third Dept 10-29-20](#)

EVIDENCE IN REPLY NOT CONSIDERED

Foreclosure---a second affidavit from the bank submitted in reply.

The bank's attempt to cure deficiencies in its prior affidavit in a second affidavit submitted in reply rejected.

[Bethpage Fed. Credit Union v Luzzi, 2019 NY Slip Op 08550, Second Dept, 11-27-19](#)

EVIDENCE IN REPLY NOT CONSIDERED

EVIDENCE SHOULD HAVE BEEN IN INITIAL MOTION PAPERS

Foreclosure---evidence in plaintiff's reply addressed for the first time an issue that was raised in defendant's answer (before plaintiff's motion for summary judgment was made).

Evidence submitted by the plaintiff for the first time in reply addressing an issue which should have been raised in the original motion papers is not considered in determining whether the moving party has made out a prima facie case for summary judgment.

[Nationstar Mtge., LLC v Tamargo, 2019 NY Slip Op 08197, Second Dept 11-13-19](#)

EVIDENCE IN REPLY NOT CONSIDERED

Workers' Compensation---the appellant moved for summary judgment alleging it was plaintiff's employer and therefore workers' compensation was plaintiff's exclusive remedy, but appellant's moving papers included a reference to a different entity as plaintiff's employer. in appellant's reply papers appellant alleged the apparent discrepancy was due to a change in the business's name.

The information about the name-change in the reply could not be considered toward the appellant's burden of proof for summary judgment, therefore appellant failed make out a prima facie case.

[Matthews v Bright Star Messenger Ctr., LLC, 2019 NY Slip Op 04375, Second Dept 6-5-19](#)

EVIDENCE IN REPLY NOT CONSIDERED

Foreclosure---evidence submitted for the first time in plaintiff bank's reply addressing the evidence necessary for the admission of business records.

The evidence submitted in reply was not considered, therefore the bank did not make out a prima facie case.

Tri-State Loan Acquisitions III, LLC v Litkowski, 2019 NY Slip Op 03398, Second Dept 5-1-19

EVIDENCE IN REPLY NOT CONSIDERED

Default Judgment---plaintiff, in support of a motion to enter a default judgment, after her complaint had been dismissed, submitted new arguments, new grounds, and new evidence, and demanded different relief, including the vacation of the dismissal, in the reply papers.

The reply papers were not properly before the court.

Lee v Law Offs. of Kim & Bae, P.C., 2018 NY Slip Op 03516, Second Dept 5-16-18

EVIDENCE OR ARGUMENT SHOULD HAVE BEEN IN INITIAL MOTION PAPERS, REPLY PAPERS NOT CONSIDERED

All-terrain-vehicle accident---two causes of action not addressed in the initial motion papers brought up for the first time in reply papers should not have been considered.

Defendant's didn't address all of plaintiff's causes of action in the initial motion papers and then unsuccessfully tried to address the omitted causes of action in reply.

[Abtey v Trivigno, 2020 NY Slip Op 06233, Second Dept 11-4-20](#)

EVIDENCE OR ARGUMENT SHOULD HAVE BEEN IN INITIAL MOTION PAPERS, REPLY PAPERS NOT CONSIDERED

Summary judgment motion submitted after the deadline did not seek leave of court to file the late motion and did not include a showing of good cause for the delay.

The attempt to demonstrate good cause for the delay for the first time in the reply papers should not have been considered.

[O'Neil v Environmental Prods. Corp., 2020 NY Slip Op 05516, Second Dept 10-7-20](#)

EVIDENCE OR ARGUMENT SHOULD HAVE BEEN IN INITIAL MOTION PAPERS, REPLY PAPERS NOT CONSIDERED

Good cause for making a late summary judgment motion must be demonstrated in the initial motion papers, not in reply papers.

[Mitchell v City of Geneva, 2018 NY Slip Op 00740, Fourth Dept 2-2-18](#)

EVIDENCE OR ARGUMENT SHOULD HAVE BEEN IN INITIAL MOTION PAPERS, REPLY PAPERS NOT CONSIDERED

NO OPPORTUNITY TO RESPOND

The emails purportedly demonstrating the transfer of shares in a cooperative apartment should have been submitted with the original cross-motion for summary judgment.

There was nothing in the opposition to the cross-motion to which the emails were a response.

Plaintiff was not given the opportunity to respond to the emails in a surreply or an oral argument.

The emails should not have been considered by the motion court.

[Gelaj v Gelaj, 2018 NY Slip Op 05917, Second Dept 8-29-18](#)

EVIDENCE OR ARGUMENT SHOULD HAVE BEEN IN INITIAL MOTION PAPERS, REPLY PAPERS NOT CONSIDERED

Slip and fall, storm in progress doctrine---climatological evidence submitted for the first time in reply.

The climatological evidence should not have been considered by the court.

[Brandimarte v Liat Holding Corp., 2018 NY Slip Op 01042, Second Dept 2-14-18](#)

EVIDENCE OR ARGUMENT SHOULD HAVE BEEN IN INITIAL MOTION PAPERS, REPLY PAPERS NOT CONSIDERED

Medical malpractice---certificate of merit submitted in reply.

In a motion to vacate the dismissal of the action for failure to prosecute, the plaintiff did not submit an affidavit of merit in her moving paper.

It appears the certificate of merit submitted in reply was therefore not considered.

[King v Dobriner, 2013 NY Slip Op 03817, 2nd Dept., 5-29-13](#)

EVIDENCE OR ARGUMENT SHOULD HAVE BEEN IN INITIAL MOTION PAPERS, REPLY PAPERS NOT CONSIDERED

Debtor-creditor---proof plaintiffs paid the debts at issue was first presented in reply papers and could not be considered.

Gamparo v Mathai, 2013 NY Slip Op 02711, 2nd Dept, 4-24-13

EVIDENCE IN REPLY WILL BE CONSIDERED IF IT RESPONDS TO AN ALLEGATION RAISED IN THE OPPOSING PAPERS

Slip and fall.

Where evidence submitted for the first time in reply is in response to an issue raised in the opposition to the summary judgment motion, here the allegation the deposition transcript is unsigned and therefore inadmissible, the reply-evidence can be considered by the court.

[Baptiste v Ditmas Park, LLC, 2019 NY Slip Op 02844, Second Dept 4-17-19](#)

EVIDENCE IN REPLY WILL BE CONSIDERED IF IT RESPONDS TO AN ALLEGATION RAISED IN THE OPPOSING PAPERS

Playground injury---reply evidence addressing an issue raised in opposition to the summary judgment motion.

Where evidence submitted for the first time in reply (apparently an expert affidavit alleging the ground cover beneath the apparatus was dangerous) addresses an issue raised in opposition to the summary judgment motion it should be considered.

[Boland v North Bellmore Union Free Sch. Dist., 2019 NY Slip Op 00849, Second Dept 2-6-19](#)

EVIDENCE IN REPLY WILL BE CONSIDERED IF IT RESPONDS TO AN ALLEGATION RAISED IN THE OPPOSING PAPERS

Labor law-construction law, evidence (that welds were not strong enough to secure the plate which struck plaintiff) submitted for the first time in reply to an issue raised in opposition to the motion for summary judgment should have been considered.

[Keerdoja v Legacy Yards Tenant, LLC, 2018 NY Slip Op 07537, First Dept 11-8-18](#)

EVIDENCE IN REPLY WILL BE CONSIDERED IF IT RESPONDS TO AN ALLEGATION RAISED IN THE OPPOSING PAPERS

Foreclosure---power of attorney submitted in reply.

The renewed power of attorney submitted in the bank's reply papers was in response to the defendants' allegation in their answering papers that the power of attorney submitted with the bank's initial motion papers had expired and the notarized affidavit was therefore invalid.

The new power of attorney was properly considered by the motion court.

[Bank of N.Y. Mellon v Hoshmand, 2018 NY Slip Op 00818, Second Dept 2-7-18](#)

EVIDENCE IN REPLY WILL BE CONSIDERED IF IT RESPONDS TO AN ALLEGATION RAISED IN THE OPPOSING PAPERS

Foreclosure---information in reply papers was a response to an argument raised in the opposition to the summary judgment motion.

Information in reply which addressed the claim in the opposition papers that plaintiff never had possession of the note and clarified the plaintiff's position in the initial motion papers was properly considered by the motion court.

[Central Mtge. Co. v Jahnsen, 2017 NY Slip Op 03474, 2nd Dept 5-3-17](#)

EVIDENCE IN REPLY WILL BE CONSIDERED IF IT RESPONDS TO AN ALLEGATION RAISED IN THE OPPOSING PAPERS

Slip and fall---evidence submitted in reply demonstrated the deposition transcript had been submitted to the plaintiff for her signature and was therefore admissible.

Proof that the deposition was admissible was presented in response to an allegation made for the first time in plaintiff's opposition papers, therefore the evidence submitted in reply was properly considered by the court.

[David v Chong Sun Lee, 2013 NY Slip Op 03811, 2nd Dept, 5-29-13](#)

**OPPORTUNITY TO RESPOND BY SUBMITTING PAPERS, REPLY
PAPERS PROPERLY CONSIDERED**

Foreclosure---affidavit submitted by the bank in reply to defendant's cross-motion for summary judgment.

The affidavit was properly considered by the motion court because defendant had the opportunity to respond, but the bank's motion was still unsuccessful.

Wells Fargo Bank, N.A. v McKenzie, 2020 NY Slip Op 05086, Second Dept 9-23-20

**OPPORTUNITY TO RESPOND BY SUBMITTING PAPERS, REPLY
PAPERS PROPERLY CONSIDERED**

Foreclosure---plaintiff bank submitted evidence in reply to address deficiencies in its original papers.

Evidence submitted in reply can be considered if the defendant has a chance to respond to it, but here the bank's motion was still unsuccessful.

LNV Corp. v Sofer, 2019 NY Slip Op 02860, Second Dept 4-17-19

OPPORTUNITY TO RESPOND BY SUBMITTING PAPERS, REPLY PAPERS PROPERLY CONSIDERED

Spoliation---surveillance video---a letter purportedly sent by plaintiff to defendant requesting that the video be preserved was first submitted in reply papers.

The letter was properly considered because the defendant was allowed to submit a surreply, but the motion was still unsuccessful.

[Sanders v 210 N. 12th St., LLC, 2019 NY Slip Op 02737, Second Dept 4-10-19](#)

OPPORTUNITY TO RESPOND BY SUBMITTING PAPERS, PLAINTIFFS' SECOND SET OF OPPOSING PAPERS PROPERLY CONSIDERED

Highbury Fire---punitive damages---plaintiffs' second set of motion papers in opposition to summary judgment were submitted before defendants' reply papers were due.

Plaintiffs' second set of opposition papers was properly considered by the court because they were submitted before the reply was due and did not change the substance of the prior papers. Therefore defendants had the opportunity to respond to the new papers.

[Borst v Lower Manhattan Dev. Corp., 2018 NY Slip Op 04679, First Dept 6-26-18](#)

OPPORTUNITY TO RESPOND BY SUBMITTING PAPERS, REPLY PAPERS PROPERLY CONSIDERED

Wrongful Death---expert evidence that the injury led to death submitted in reply.

This crucial expert evidence submitted in reply was properly considered by the court because the defendant was allowed to submit a surreply.

[Frangiadakis v 51 W. 81st St. Corp., 2018 NY Slip Op 03331, First Dept 5-8-18](#)

OPPORTUNITY TO RESPOND TO BY SUBMITTING PAPERS AND WITH ORAL ARGUMENT, REPLY PAPERS PROPERLY CONSIDERED

Traffic accident---defendants submitted an unauthorized surreply.

Plaintiff responded to the unauthorized surreply both in a written submission and at oral argument.

The court properly considered the surreply and properly determined the surreply raised a triable issue of fact.

[Gluck v New York City Tr Auth, 2014 NY Slip Op 03977, 2nd Dept 6-4-14](#)

**OPPORTUNITY TO RESPOND BY SUBMITTING PAPERS, REPLY
PAPERS PROPERLY CONSIDERED**

Courts have the discretion to accept unauthorized surreplies.

Here the surreply was substantive, good cause and a lack of prejudice was demonstrated, and the defendant was given the opportunity to respond.

[U.S. Bank Trust, N.A. v Rudick, 2017 NY Slip Op 08874, Second Dept 12-20-17](#)

**OPPORTUNITY TO RESPOND WITH ORAL ARGUMENT, REPLY
PAPERS PROPERLY CONSIDERED**

Medical malpractice, municipal law---application for leave to file a late notice of claim.

The medical records submitted by the petitioner for the first time in reply to show the hospital's timely awareness of the claim properly considered because the respondent addressed the issues raised by the records at oral argument.

[Matter of Dusch v Erie County Med. Ctr., 2020 NY Slip Op 03351, Fourth Dept 7-12-20](#)

OPPORTUNITY TO RESPOND WITH ORAL ARGUMENT, REPLY PAPERS PROPERLY CONSIDERED

Family law---motion to set aside a stipulation of settlement.

The court properly considered issues first raised in plaintiff's reply papers because defendant addressed those issues at oral argument

[Jon v Jon, 2014 NY Slip Op 08961, 2nd Dept 12-24-14](#)

EVIDENCE IN REPLY SUPPLEMENTED OR CLARIFIED PRIOR SUBMISSIONS, REPLY PAPERS PROPERLY CONSIDERED

Labor law-construction law---affidavit submitted in reply which did not contradict other evidence was properly considered.

The affidavit submitted by the plaintiff in reply clarified and supplemented an affidavit by the same person which was drafted by the defendant and which had omitted relevant information.

The affidavit submitted in reply did not conflict with the other evidence of the construction accident, including a third affidavit by the same witness submitted with the original motion papers.

The reply affidavit was properly accepted by the motion court, but the rationale for its acceptance was not explained.

[Cuevas v Baruti Constr. Corp., 2018 NY Slip Op 05905, First Dept 8-23-18](#)

FAILURE TO ATTACH PLEADINGS TO INITIAL MOTION PAPERS CURED IN REPLY

Hospital's vicarious liability for assault by doctor

The defendant-hospital's failure to attach the pleadings to the initial motion papers was cured by attaching them to the reply papers.

[Montalvo v Episcopal Health Servs., Inc., 2019 NY Slip Op 04158, Second Dept 5-29-19](#)

Similarly, in [Sensible Choice Contr., LLC v Rodgers, 2018 NY Slip Op 05790, Second Dept 8-15-18](#), attaching the summons and complaint to the reply papers cured the failure to do so in the initial papers.

SPECIAL PROCEEDINGS (LATE NOTICE OF CLAIM)

EVIDENCE IN REPLY NOT CONSIDERED

Municipal law---a special proceeding, here an application for leave to file a late notice of claim, is subject to the same proof requirements as a motion for summary judgment.

The general rule in seeking permission to file a late notice of claim is arguments or evidence submitted in reply cannot be considered by the court.

[Matter of Gonzalez v City of New York, 2015 NY Slip Op 03467, 1st Dept 4-28-15](#)

SPECIAL PROCEEDINGS (LATE NOTICE OF CLAIM)

OPPORTUNITY TO RESPOND WITH ORAL ARGUMENT, REPLY PAPERS PROPERLY CONSIDERED

Municipal law---a special proceeding, here an application for leave to file a late notice of claim, is subject to the same proof requirements as a motion for summary judgment.

Medical malpractice---the medical records submitted by the petitioner for the first time in reply to show the hospital's timely awareness of the claim properly considered because the respondent addressed the issues raised by the records at oral argument.

[Matter of Dusch v Erie County Med. Ctr., 2020 NY Slip Op 03351, Fourth Dept 7-12-20](#)

SUBSEQUENT SUMMARY JUDGMENT MOTION CAN RAISE AN ISSUE SUBMITTED IN REPLY IN A PRIOR SUMMARY JUDGMENT MOTION

Slip and fall---an issue that was not properly before the court in a motion for summary judgment because it was first presented in reply papers can be raised in a subsequent motion for summary judgment without violating the rule against successive summary judgment motions.

Vaughn v Veolia Transp Inc, 2014 NY Slip Op 03679, 2nd Dept 5-21-14

SUMMARY JUDGMENT IN LIEU OF COMPLAINT

OPPORTUNITY TO RESPOND WITH WRITTEN SUBMISSIONS, REPLY PAPERS PROPERLY CONSIDERED

There is no impediment to allowing plaintiff to supplement the documents submitted in support of a motion for summary judgment in lieu of a complaint after the defendant has submitted its opposition papers.

Defendant had the opportunity to respond to the additional documents.

Sea Trade Mar Corp v Coutsodontis, 2013 NY Slip Op 07560, 1st Dept 11-14-13