NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Practice Newsletter
December 2020

A Succinct Collection of the Salient Issues Addressed in the Civil Procedure Decisions Released by Our New York State Appellate Courts in December 2020. The Citations Link to the Decisions on the Official New York Courts Website. The Full Decision-Summaries Are Available in the December 2020 Civil Procedure Update Pamphlet.

ABANDONMENT, SUBMISSION OF JUDGMENT.

PLAINTIFF'S FORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED, SUA SPONTE, AS ABANDONED PURSUANT TO 22 NYCRR 202.48; THE 60-DAY TIME LIMIT ONLY APPLIES TO THE DIRECTION TO SUBMIT A JUDGMENT "ON NOTICE" (SECOND DEPT).

James B. Nutter & Co. v McLaughlin, 2020 NY Slip Op 07178, Second Dept 12-2-20

Practice Point: If a judge directs that an order or judgment be submitted for signature "on notice," the 60-day time-limit in 22 NYCRR 202,48 applies and the order or judgment will be deemed abandoned if the 60-day deadline is not met. But if, as here, the direction to submit the order or judgment for signature does not specify that it be submitted "on notice," the 60-day time-limit does not apply.

APPEALS, RETRIAL AFTER REMITTAL.

THE DECRETAL PARAGRAPH OF THE APPELLATE DECISION REMITTING THE MATTER FOR RETRIAL DID NOT IMPOSE THE CONDITIONS ON RETRIAL WHICH WERE IMPOSED BY SUPREME COURT; NEW TRIAL ORDERED (SECOND DEPT).

Daniele v Pain Mgt. Ctr. of Long Is., 2020 NY Slip Op 07860, Second Dept 12-23-20

Practice Point: When a matter is remitted for retrial after an appeal, the trial court cannot impose restrictions on the retrial which were not imposed by the appellate court. Here the trial court improperly limited the retrial to the apportionment of damages which effectively precluded reconsideration of the amount of damages.

ARTICLE 78, WRIT OF PROHIBITION, CRIMINAL LAW.

ALTHOUGH THE TWO INDICTMENTS ALLEGED THE SAME MODUS OPERANDI FOR MEDICAID FRAUD, THE CHARGES INVOLVED DIFFERENT PARTIES AND TIME PERIODS; THE WRIT OF PROHIBITION SEEKING TO PRECLUDE PROSECUTION ON DOUBLE JEOPARDY GROUNDS DENIED OVER A DISSENT (FIRST DEPT).

Matter of Dieffenbacher v Jackson, 2020 NY Slip Op 08015, First Dept 12-29-20

Practice Point: An Article 78 proceeding seeking a writ of prohibition is a proper vehicle for contesting the trial judge's ruling that a second prosecution was not precluded by the double jeopardy prohibition. Here there were two indictments charging Medicaid fraud. Although the modus operandi was the same in the two indictments, the parties and time periods were different.

ARTICLE 78.

THE PETITIONER, A PROBATIONARY POLICE OFFICER CHALLENGING HIS TERMINATION, RAISED QUESTIONS OF FACT IN THIS ARTICLE 78 PROCEEDING; THEREFORE THE SUMMARY DETERMINATION PURSUANT TO CPLR 409 WAS NOT AVAILABLE (SECOND DEPT).

Matter of Lake v Town of Southold, 2020 NY Slip Op 08064, Second Dept 12-30-20

Practice Point: Where there are contested questions of fact in an Article 78 proceeding, a summary determination pursuant to CPLR 409 is not available.

ATTACHMENT.

THE CRITERIA FOR THE HARSH REMEDY OF ATTACHMENT WERE NOT MET (SECOND DEPT).

651 Bay St., LLC v Discenza, 2020 NY Slip Op 07331, Second Dept 12-9-20

Practice Point: Attachment is considered a harsh remedy and requires a strong evidentiary showing of one or more of the grounds in CPLR 6201. Here the suspicion of an intent to defraud on defendant's part and the removal or assignment of property was not enough.

DEFAULT.

ALTHOUGH DEFENDANT NEVER ANSWERED THE COMPLAINT, HE APPEARED BY MAKING A MOTION TO DISMISS AND PARTICIPATED IN THE LITIGATION, THEREFORE DEFENDANT'S MOTION TO VACATE THE DEFAULT SHOULD HAVE BEEN GRANTED; DISMISSAL OF THE ACTION FOR FAILURE TO INCLUDE A NECESSARY PARTY OR THE FAILURE TO JOIN OR SUBSTITUTE A PARTY WAS NOT WARRANTED (SECOND DEPT).

Kelley v Garuda, 2020 NY Slip Op 07180, Second Dept 12-2-20

Practice Point: Although the defendant did not answer the complaint, he did move to dismiss the complaint, which extended the time to submit an answer, and he participated in the litigation. He therefore appeared in the action within the meaning of CPLR 302(a) and his motion to vacate the default judgment should have been granted.

FAILURE TO PROSECUTE.

THE ACTION SHOULD NOT HAVE BEEN DISMISSED PURSUANT TO CPLR 3216 FOR FAILURE TO PROSECUTE; ISSUE HAD NOT BEEN JOINED AND OTHER CONDITIONS PRECEDENT TO DISMISSAL WERE NOT MET (SECOND DEPT).

U.S. Bank N.A. v Thompson, 2020 NY Slip Op 08098, Second Dept 12-30-20

Practice Point: Where, as here, issue has not been joined, the action cannot be dismissed for failure to prosecute pursuant to CPLR 3216.

FAILURE TO PROSECUTE.

THE CONDITIONAL ORDER OF DISMISSAL FOR FAILURE TO PROSECUTE DID NOT MEET THE CRITERIA OF CPLR 3216; THEREFORE THE MATTER SHOULD NOT HAVE BEEN ADMINISTRATIVELY DISMISSED (SECOND DEPT).

Deutsche Bank Natl. Trust Co. v Henry, 2020 NY Slip Op 07863, Second Dept 12-23-20

Practice Point: The criteria in CPLR 3216 for the dismissal of an action for failure to prosecute are strictly construed. Here the order did not inform plaintiff that the failure to file a note of issue within 90 days will serve as a basis for a motion by the court to dismiss for failure to prosecute. Therefore the action should not have been administratively dismissed.

JUDGES, SUA SPONTE, FORECLOSURE, NOTICE, AFFIRMATIVE DEFENSES.

THE DEFENDANTS DEFAULTED IN THIS FORECLOSURE ACTION; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT BASED ON THE BANK'S ALLEGED FAILURE TO COMPLY WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, WHICH IS NOT A JURISDICTIONAL DEFECT AND THEREFORE MUST BE RAISED AS A DEFENSE (SECOND DEPT).

Chase Home Fin., LLC v Guido, 2020 NY Slip Op 07854, Second Dept 12-23-20

Practice Point: In a foreclosure action the failure to comply with the notice requirements of the Real Property Actions and Proceedings Law is not a jurisdictional defect. Therefore any alleged failure to comply must be raised as an affirmative defense. Here the defendant defaulted so the issue was not before the court and should not have been ruled on.

JUDGES, SUA SPONTE.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, IMPOSED AN INJUNCTION AND DETERMINED ISSUES OF FACT; NO MOTION WAS BEFORE THE COURT AND NO HEARING WAS HELD (SECOND DEPT).

City of New York v Quadrozzi, 2020 NY Slip Op 07857, Second Dept 12-23-20

Practice Point: Where there is no motion before the court, no rulings or findings of fact can be made.

MUNICIPAL LAW.

A GENERAL BUSINESS LAW 349 DECEPTIVE BUSINESS PRACTICE ACTION AGAINST THE CITY SOUNDS IN TORT TRIGGERING THE NOTICE OF CLAIM REQUIREMENT (SECOND DEPT).

Singh v City of New York, 2020 NY Slip Op 08123, Second Dept 12-30-20

Practice Point. A deceptive business practice action pursuant to General Business Law 349 against a municipality sounds tort and therefore triggers the Notice of Claim requirement as a condition precedent to filing suit.

NECESSARY PARTIES, FORECLOSURE, TRUSTS AND ESTATES.

THE ESTATE WAS A NECESSARY PARTY IN THIS FORECLOSURE ACTION BECAUSE OF THE POTENTIAL FOR A DEFICIENCY JUDGMENT AGAINST THE DECEDENT; DEFENDANT'S CROSS MOTION FOR LEAVE TO SUBSTITUTE HERSELF AS ADMINISTRATOR OF THE ESTATE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Specialized Loan Servicing, LLC v Kalinin, 2020 NY Slip Op 07417, Second Dept 12-9-20

Practice Point: In a foreclosure action, if there is the possibility of a deficiency judgment against a decedent, the estate is a necessary party.

NECESSARY PARTIES, FORECLOSURE.

THE PROPERTY TRANSFERRED TO THE DEFENDANT BY WILL UPON THE DEATH OF THE PROPERTY OWNER; THEREFORE THE ESTATE WAS NOT A NECESSARY PARTY IN THIS FORECLOSURE ACTION (SECOND DEPT).

US Bank Trust, N.A. v Gaines,2020 NY Slip Op 07623, Second Dept 12-16-20

Practice Point: In this foreclosure action, the property transferred by will to the beneficiaries upon death. Therefore the estate was not a necessary party.

PLEADINGS, AMEND COMPLAINT. PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO CORRECTLY NAME THE DEFENDANT PURSUANT TO CPLR 305(C) AFTER THE STATUTE OF LIMITATIONS HAD RUN SHOULD HAVE BEEN GRANTED (THIRD DEPT).

Kachadourian v Wilkes, 2020 NY Slip Op 07972, Third Dept 12-24-20

Practice Point: If a party was misnamed in the complaint, but was nonetheless timely served within the limitations period, amendment of the summons and complaint should be allowed.

SERVICE OF PROCESS, FOREIGN CORPORATIONS.

SERVICE ON AN UNAUTHORIZED FOREIGN CORPORATION DID NOT COMPLY WITH BUSINESS CORPORATION LAW 307, A JURISDICTIONAL DEFECT (SECOND DEPT).

Friedman v Goldstein, 2020 NY Slip Op 07548, Second Dept 12-16-20

Practice Point: Business Corporation Law 307 governs service of process on a foreign corporation not authorized to do business in New York. Here service was invalid because the plaintiff did not ascertain the address of the corporation on file in the appropriate government agency or office in Paraguay before mailing the summons and complaint to the last known address.

SERVICE OF PROCESS.

SURROGATE'S COURT HAD THE AUTHORITY TO APPROVE, NUNC PRO TUNC, A METHOD OF SERVICE ON AN OUT-OF-STATE PARTY ACCOMPLISHED WITHOUT PRIOR COURT APPROVAL (SECOND DEPT).

Matter of Pollina, 2020 NY Slip Op 08068, Second Dept 12-30-20

Practice Point: The Second Department held that Surrogate's Court Procedure Act (SCPA) 307 gives the court the authority to deem valid a method of service that is not in compliance with the statute after service had been made. Here the executor made several unsuccessful attempts at service before successfully using first-class mail. There was no question that the party was served and was aware of the scheduled hearing.

STANDING, FORECLOSURE.

ALTHOUGH RPAPL 1320-a, ENACTED WHILE THIS APPEAL WAS PENDING, HAS CHANGED THINGS, THE DEFENDANTS' LACK-OF-STANDING DEFENSE WAS WAIVED BECAUSE IT WAS NOT RAISED IN THEIR ANSWERS OR PRE-ANSWER MOTIONS; THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED (CT APP).

JPMorgan Chase Bank, N.A. v Caliguri, 2020 NY Slip Op 07660, CtApp 12-17-20

Practice Point: Newly enacted Real Property Actions and Proceedings Law 1320-a allows the lack-of-standing defense to a foreclosure action to be raised even if not included in the answer. Failure to raise the defense in the answer no longer waives the defense.

STANDING, NOTICE REQUIREMENTS, FORECLOSURE.

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 OR THE MORTGAGE AND DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

U.S. Bank N.A. v Kohanov, 2020 NY Slip Op 07242, Second Dept 12-2-20

Practice Point: This decision is another in a line of hundreds of similar decisions over the past few years holding that the bank in a foreclosure action did not present admissible evidence of compliance with the notice requirements of Real Property Actions and Proceedings Law 1304, as well as sufficient evidence of standing to bring the action. Here, in addition to the usual failure to submit sufficient evidence of the mailing of the notice and the failure to satisfy the business records exception to the hearsay rule, the bank did not present sufficient evidence that the original note had been lost.

STATUTE OF LIMITATIONS, ADMINISTRATIVE LAW.

THE RECEIPT OF THE LETTER BY CERTIFIED MAIL, NOT THE PRIOR RECEIPT OF AN EMAIL WITH THE LETTER ATTACHED, TRIGGERED THE FOUR-MONTH STATUTE OF LIMITATIONS FOR BRINGING AN ARTICLE 78 PROCEEDING; THE OMISSION OF THE REQUIREMENT THAT THE RESPONDENTS BE SERVED WITH THE ORDER TO SHOW CAUSE COULD BE REMEDIED BY AN EXTENSION OF THE TIME TO EFFECT SERVICE PURSUANT TO CPLR 306-B (THIRD DEPT).

Matter of Park Beach Assisted Living, LLC v Zucker, 2020 NY Slip Op 07264, Third Dept 12-3-20

Practice Point: Here the issue was whether the four-month statute of limitations rendered the Article 78 action untimely. The Department of Health's decision denying the application to open an assisted living facility was emailed to the petitioner and subsequently sent by certified mail. If the statute was triggered by the email the action was untimely. The court held the statute was triggered by the subsequent letter sent by certified mail.

STATUTE OF LIMITATIONS, CONTRACT LAW.

THERE WAS A QUESTION OF FACT WHETHER THE ONE-YEAR STATUTE OF LIMITATIONS IN THE CONTRACT WITH DEFENDANT SUBCONTRACTOR WAS REASONABLE BECAUSE THE RUNNING OF THE STATUTE COULD BE TRIGGERED BY A PARTY OVER WHICH DEFENDANT HAD NO CONTROL (FIRST DEPT).

Turner Constr. Co. v Nastasi & Assoc., Inc., 2020 NY Slip Op 08024, First Dept 12-29-20

Practice Point: The one-year statute of limitations in the contract could be triggered by a party over which the defendant had no control, raising a question of fact whether the contractual limitations period was reasonable.

STATUTE OF LIMITATIONS, FORECLOSURE.

CPLR 204(A) IN CONJUNCTION WITH RPAPL 1301(3) TOLLED THE STATUTE OF LIMITATIONS WHILE THE FIRST FORECLOSURE ACTION WAS PENDING, FROM 2010 TO 2013, RENDERING THE SECOND FORECLOSURE ACTION IN 2017 TIMELY (THIRD DEPT).

Citimortgage, Inc. v Ramirez, 2020 NY Slip Op 07970, Third Dept 12-24-20

Practice Point: CPLR 204 in conjunction with Real Property Actions and Proceedings Law (RPAPL) 1301 tolled the statute of limitations in this foreclosure action. RPAPL 1301 prohibits filing a second foreclosure action while the first is still pending, tolling the statute of limitations until the first action is terminated.

STATUTE OF LIMITATIONS, FORECLOSURE.

THE FORECLOSURE ACTION WAS TIME-BARRED; THE DISCONTINUANCE DID NOT DE-ACCELERATE THE DEBT (SECOND DEPT).

Deutsche Bank Natl. Trust Co. v Ebanks, 2020 NY Slip Op 08035, Second Dept 12-30-20

Practice Point: The statute of limitations is triggered by the filing of a foreclosure action, which accelerates the debt. A subsequent discontinuance which is silent on the subject does not de-accelerate the debt.

SUBSTITUTE A PARTY, BANKRUPTCY.

IN THE ABSENCE OF AN ORDER SUBSTITUTING THE BANKRUPTCY TRUSTEE FOR THE PLAINTIFF-DEBTOR, THE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT SHOULD HAVE BEEN GRANTED; SUPREME COURT SHOULD NOT HAVE DENIED DEFENDANTS' MOTION AND DIRECTED PLAINTIFF TO SEEK RELIEF FROM THE BANKRUPTCY COURT (SECOND DEPT).

Turner v Owens Funeral Home, Inc., 2020 NY Slip Op 07238, Second Dept 12-2-20

Practice Point: Once a bankruptcy proceeding is started, any cause of action of the debtor vests in the bankruptcy trustee. Here the action should have been dismissed because the bankruptcy trustee had not been substituted for the plaintiff-debtor.