NEW YORK APPELLATE DIGEST, LLC

"Judge, Can You Do That?"
Year in Review 2020
Orders and Findings Made "Sua Sponte"

An Organized Compilation of Summaries of Selected Decisions Released by Our New York State Appellate Courts in 2020 Addressing the Limits on a Judge's Authority to Make Rulings or Findings Sua Sponte.

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AUTHORITY MISAPPLIED. ATTORNEY DISQUALIFICATION.

PLAINTIFF COULD NOT MOVE TO DISQUALIFY LAW FIRMS WHICH NEVER REPRESENTED PLAINTIFF (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff did not have standing to move to disqualify two law firms (SZA and ABZ), one of which represented defendant, on conflict of interest grounds in this foreclosure/property-ownership dispute because neither law firm ever represented plaintiff. Apparently there was some overlap of personnel in the two law firms:

The basis for a disqualification motion is the alleged breach of the fiduciary duty owed by an attorney to a current or former client … . When the law firm targeted by the disqualification motion has never represented the moving party, that firm owes no duty to that party. "[I]t follows that if there is no duty owed there can be no duty breached" … . Since plaintiff never had an attorney-client relationship with either SZA or ABZ, plaintiff had no standing to bring a motion to disqualify … .

To be sure, a court has the authority to act sua sponte to disqualify counsel if it finds a conflict of interest warranting disqualification … . However, the record before us does not support disqualification. The two defendants present a united front to plaintiff at this juncture. Their answers raise virtually the same affirmative defenses and counterclaims to the complaint, and the defenses and counterclaims of one defendant do not undermine the position of the other … . If defendants' interests do come to diverge in this litigation then counsel of course has a duty to ensure compliance with rule 1.7 of the New York Rules of Professional Conduct (22 NYCRR 1200.0). HSBC Bank USA, N.A. v Santos, 2020 NY Slip Op 03976, First Dept 7-16-20

GROUND NOT RAISED, CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

JUDGE SHOULD NOT HAVE, SUA SPONTE, ASSESSED POINTS ON A THEORY NOT RAISED BY THE BOARD OF EXAMINERS OF SEX OFFENDERS OR THE PEOPLE; DEFENDANT WAS THEREBY DEPRIVED OF HIS RIGHT TO DUE PROCESS OF LAW (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the judge should not have, sua sponte, assessed points on a theory not raised by the Board of Examiners of Sex Offenders or the People:

… [D]efendant contends, and the People correctly concede, that County Court violated his right to due process by sua sponte assessing points on a theory not raised by the Board of Examiners of Sex Offenders or the People … . The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a meaningful opportunity to respond to the risk level assessment … . Here, no allegations were made either in the risk assessment instrument (RAI) or by the People at the SORA hearing that defendant should be assessed 30 points under risk factor 3, and defendant learned of the assessment of the additional points under that risk factor for the first time when the court issued its decision … . …

The court stated that, if defendant were a presumptive level one risk, an upward departure to level two would be warranted based on certain aggravating factors stemming from the nature of the crimes. Because those factors were not presented as bases for departure in the RAI or by the People at the hearing, defendant was not afforded notice and a meaningful opportunity to respond to them … . People v Wilke, 2020 NY Slip Op 02002, Fourth Dept 3-20-20

GROUND NOT RAISED, LABOR LAW-CONSTRUCTION LAW.

JUDGE SHOULD NOT HAVE SEARCHED THE RECORD AND, SUA SPONTE, GRANTED RELIEF NOT REQUESTED IN THE MOTION PAPERS, INCLUDING THE APPLICATION OF THE RES IPSA LOQUITUR DOCTRINE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the judge should not have, sua sponte, searched the record to grant relief that was not requested in this Labor Law 200, 240(1), 241(6), negligence action. Plaintiff was injured when a portion of a ceiling fell causing a scaffold to collapse on him. The judge should not have granted summary judgment on a negligence cause of action which was not included in the motions, and should not have granted summary judgment on a res ipsa loquitur theory:

While it is well settled that the Supreme Court has the authority to search the record and grant summary judgment to a nonmoving party with respect to an issue that was the subject of a motion before the court (see CPLR 3212[b] …), here, the court, in effect, searched the record and awarded summary judgment to the movant with respect to an issue that was not the subject of the motion before the court. …

The doctrine of res ipsa loquitur applies when the injury-causing event (1) is "of a kind which ordinarily does not occur in the absence of someone's negligence"; (2) "[is] caused by an agency or instrumentality within the exclusive control of the defendant"; and (3) was not "due to any voluntary action or contribution on the part of the plaintiff" … . Contrary to the Supreme Court's determination, this is not one of "the rarest of res ipsa loquitur cases" where the plaintiff's circumstantial evidence is so convincing and the defendant's response so weak that the inference of the defendant's negligence is inescapable … . Although the first and third elements may be satisfied in the plaintiff's favor, based upon the limited record, this standard was not met as to the second element. Even though courts do not generally apply the requirement of exclusive control as it is literally stated or as a fixed, mechanical or rigid rule … , the plaintiff failed to demonstrate that the plaster ceiling is "structural" and, therefore, the obligation of [defendant] Lexington to maintain pursuant to the terms of the lease it entered into with [defendant] Dover. Moreover, the papers do not establish the plaintiff's entitlement to summary judgment against Dover on this

issue, which was raised by the court sua sponte as against Dover, and was not the subject of the plaintiff's motion as against Dover. Zhigue v Lexington Landmark Props., LLC, 2020 NY Slip Op 02948, Second Dept 5-20-20

GROUND NOT RAISED, LABOR LAW-CONSTRUCTION LAW.

LABOR LAW 200 CAUSE OF ACTION BASED UPON A DANGEROUS CONDITION PROPERLY SURVIVED SUMMARY JUDGMENT, APPELLANTS DID NOT DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION; JUDGE SHOULD NOT HAVE, SUA SPONTE, DENIED A MOTION ON A GROUND NOT RAISED BY A PARTY (SECOND DEPT).

The Second Department determined the Labor Law 200 and common-law negligence causes of action properly survived summary judgment. The Second Department noted the court should not have, sua sponte, denied appellants' motion on the ground the deposition transcripts were inadmissible because that issue was not raised. Plaintiff was working in the bottom of a hole which was muddy from heavy rain and littered with boulders and rocks. Plaintiff was injured when he allegedly slipped and fell because of the mud. The Second Department held that the causes of action were based upon a dangerous condition, not the method and manner of work, and the appellants did not demonstrate they lacked actual or constructive notice of the condition:

Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work … . There are "two broad categories of actions that implicate the provisions of Labor Law § 200" … . The first category involves worker injuries arising out of alleged dangerous or defective conditions on the premises where the work is performed … . In those circumstances, "[f]or liability to be imposed on the property owner, there must be evidence showing that the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time" … . The second category of actions under Labor Law § 200 involves injuries arising from the method and manner of the work … . A property

owner will be held liable under this category only if it possessed the authority to supervise or control the means and methods of the work … .

Contrary to the appellants' contention, the plaintiff's accident arose from a dangerous premises condition, not from the method and manner of the work. Where a plaintiff alleges that he or she was injured at a work site as a result of a dangerous premises condition, a property owner's liability under Labor Law § 200 and for common-law negligence rests upon whether the property owner created the condition, or had actual or constructive notice of it and a reasonable amount of time within which to correct the condition … . Modugno v Bovis Lend Lease Interiors, Inc., 2020 NY Slip Op 03508, Second Dept 6-24-20

GROUND NOT RAISED, MEDICAL MALPRACTICE.

DEFENDANT PHYSICIAN MAY BE LIABLE FOR FAILURE TO ADVISE DECEDENT AND THE NURSE MIDWIFE AGAINST HOME BIRTH; SUCH FAILURE COULD CONSTITUTE A PROXIMATE CAUSE OF DEATH; JUDGE SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT BASED IN PART ON A GROUND NOT RAISED BY THE PARTIES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should not have been granted. Defendant, Lascale, is a board-certified obstetrician and gynecologist specializing in maternal-fetal medicine. Plaintiff's decedent died in childbirth when she was assisted at home by a certified nurse midwife (Moss Jones). Plaintiffs alleged Lascale negligently failed to advise decedent and Moss Jones of the dangers of a home birth given the baby's size and the fact decedent had previously given birth by caesarian section. Lascale argued his limited role, analyzing periodic sonograms, did not include advice on delivery. The Second Department noted that the motion court, sua sponte, should not have granted defendant's motion based in part on an issue not raised by the parties:

Although Lescale, a board-certified obstetrician and gynecologist, purported to limit the scope of his duty to the field of maternal-fetal medicine, and the performance

and interpretation of ultrasounds, it was within such limited scope of duty to consult with the decedent and Moss Jones … , concerning his diagnosis of suspected fetal macrosomia [the baby was very large], and how such diagnosis would increase the risks of a VBAC [vaginal birth after caesarian section] home birth, given all of the other risk factors that were present. Given such risks, it was also within the scope of Lescale's duty to advise the decedent and Moss Jones against proceeding with the planned VBAC home birth. * * *

"When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" . "It is only where the intervening act is extraordinary under the circumstances, not foreseeable in the norm… al course of events, or independent of or far removed from the defendant's conduct, that it may possibly break the causal nexus" … .

* * * Whether the decedent would have heeded appropriate warnings and advice by Lescale in light of, inter alia, the purported warnings she was given by Moss Jones, or her own views, is for the jury to decide … . Romanelli v Jones, 2020 NY Slip Op 00316, Second Dept 1-15-20

GROUND NOT RAISED, NEGLIGENCE.

DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL WAS LAST INSPECTED OR CLEANED; SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON A GROUND NOT RAISED BY THE PARTIES, I.E., FINDING THE DEFECT TRIVIAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this staircase slip and fall case should not have been granted. The defendant did not demonstrate it did not have constructive notice of salt (used to melt ice) on the steps. Supreme Court should not have, sua sponte, granted the motion on the ground the salt constituted a trivial defect because the parties did not raise that issue:

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" … . To meet its burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the accident … .Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" … . Here, in support of the motion, the defendant submitted, inter alia, the deposition testimony of the part-time porter and the deposition testimony of the property manager of the defendant's building, which merely provided evidence as to the defendant's general cleaning practices, with no evidence as to when the area at issue was last inspected or cleaned prior to the accident.

The Supreme Court should not have granted the defendant's motion on the ground that the presence of the salt on the step at issue constituted a trivial defect since the parties did not raise this issue … . Johnson v 101-105 S. Eighth St. Apts. Hous. Dev. Fund Corp., 2020 NY Slip Op 03773, Second Dept 7-8-20

GROUND NOT RAISED, REAL PROPERTY, ZONING.

THE JUDGE SHOULD NOT HAVE DISMISSED CAUSES OF ACTION ON A GROUND (STANDING) NOT RAISED BY A PARTY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed causes of action for lack of standing when that issue was not raised by the parties:

We thus conclude that the court erred in sua sponte reaching the issue of standing with respect to the second and third causes of action … . Standing "is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation" … . Inasmuch as the … respondents' cross motion with respect to the second and third causes of action was not based on petitioners' alleged lack of standing, there was no basis for the court to reach that issue. Matter of Barbeau v Village of LeRoy, 2020 NY Slip Op 01732, Fourth Dept 3-13-20

RELIEF NOT AUTHORIZED, 22 NYCRR 202.48.

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).

The Second Department, reversing Supreme Court, determined the court should not have dismissed plaintiff's foreclosure action, sua sponte, as abandoned pursuant to 22 NYCRR 202.48. Supreme Court, after plaintiff's unopposed motion for a judgment of foreclosure and sale, directed the plaintiff to "submit judgment." When plaintiff submitted a proposed judgment for signature, Supreme Court dismissed the action because the proposed judgment was not submitted within 60 days. The 60-day time limit only applies when a party is directed to submit the judgment "on notice:"

Pursuant to 22 NYCRR 202.48, an order or judgment which is directed to be settled or submitted on notice must be submitted for signature within 60 days after the signing and filing of the decision directing that the order or judgment be settled or submitted. A party who fails to submit the order or judgment within the 60-day time period will be deemed to have abandoned the action or motion, absent good cause shown … . In this case, when the Supreme Court initially granted the plaintiff's motion, inter alia, for a judgment of foreclosure and sale, it did not direct that the proposed judgment had to be settled or submitted on notice. 22 NYCRR 202.48 does not apply where, as here, the court merely directs a party to submit an order or judgment without expressly directing that the order or judgment be submitted on notice … . James B. Nutter & Co. v McLaughlin, 2020 NY Slip Op 07178, Second Dept 12-2-20

RELIEF NOT AUTHORIZED, CPLR 3215.

PLAINTIFF BANK MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR; DESPITE THE WITHDRAWAL OF THE MOTION, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED, SUA SPONTE, PURSUANT TO CPLR 3215 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint in this foreclosure action should not have been, sua sponte, dismissed for failure to take steps to procure a default judgment within one year. Plaintiff moved for an order of reference within one year. It doesn't matter that the motion was withdrawn:

Pursuant to CPLR 3215(c), "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c) … . "Rather, it is enough that the plaintiff timely takes 'the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference' to establish that it 'initiated proceedings for entry of a judgment within one year of the default,' for the purposes of satisfying CPLR 3215(c)" … .

Here, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference in May 2010, within one year of the defendants' default … . In such cases, the complaint should not be dismissed pursuant to CPLR 3215(c), even if, as here, the plaintiff's motion is later withdrawn … . Deutsche Bank Natl. Trust Co. v Hasan, 2020 NY Slip Op 06243, 11-4-20

RELIEF NOT AUTHORIZED, CPLR 3216.

THE COURT'S ORDER DIRECTING PLAINTIFFS TO FILE A NOTE OF ISSUE DID NOT COMPLY WITH THE CRITERIA FOR A 90-DAY NOTICE PURSUANT TO CPLR 3216; THE COURT SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' motion to restore the action to active status and to extend the time to serve and file a note of issue should have been granted. Supreme Court, after a compliance conference, directed plaintiffs to file a note of issue by August 4, 2016, which was 21 days from the date of the compliance conference order. The compliance order therefore did not meet the statutory criteria for a valid 90-day notice pursuant to CPLR 3216. Supreme Court should not have, sua sponte, directed dismissal of the complaint pursuant to CPLR 3216:

The compliance conference order dated July 14, 2016, did not constitute a valid 90-day demand pursuant to CPLR 3216 because it directed the plaintiffs to file a note of issue within 21 days, rather than 90 days, of the date of the order … . Furthermore, the compliance conference order failed to set forth any specific conduct constituting neglect by the plaintiffs in proceeding with the litigation (see CPLR 3216[b][3] …). In addition, the Supreme Court failed to give the parties notice and an opportunity to be heard prior to, sua sponte, directing dismissal of the complaint pursuant to CPLR 3216 … .

Since the statutory preconditions to dismissal were not met, the Supreme Court should not have, sua sponte, directed dismissal of the complaint pursuant to CPLR 3216 … .

Contrary to the respondents' contention, this action could not have properly been dismissed pursuant to CPLR 3126, since there was no motion requesting this relief … . Christiano v Heatherwood House at Holbrook II, LLC, 2020 NY Slip Op 03891, Second Dept 7-15-20

RELIEF NOT AUTHORIZED, APPEALS.

ACCOUNTING CAUSE OF ACTION IN THIS SHAREHOLDERS' DERIVATIVE SUIT SHOULD NOT HAVE BEEN DISMISSED; ALTHOUGH SUA SPONTE ORDERS ARE NOT APPEALABLE, THE APPEAL WAS HEARD IN THE INTEREST OF JUSTICE; PROPER WAY TO HANDLE A SUA SPONTE ORDER IS TO MOVE TO VACATE AND THEN APPEAL (FIRST DEPT).

The First Department, reversing Supreme Court in this shareholders' derivative action against a low-income Housing Development Fund Corporation (HDFC), determined: (1) although a sua sponte order is not appealable, the appeal of the dismissal of the cause of action for an accounting is heard in the interest of justice; (2) the proper way to handle a sua sponte order is to move to vacate it and then appeal; (3) there was no need to amend the complaint because the accounting cause of action included the right to damages for wrongdoing (here the alleged failure to account for the sale of an apartment for $90,000):

An order issued sua sponte is not appealable as of right (see CPLR 5701[a][2] …). Plaintiffs' remedy is to move to vacate the court's order, and, if the motion is denied, appeal from that order (CPLR 5701[a][3] …). …

… [W]e find that Supreme Court erred in dismissing the complaint because the cause of action for an equitable accounting was not moot. Supreme Court conflated the first cause of action for the inspection of the HDFC's books and records with the second cause of action for an equitable accounting … . Defendants failed to demonstrate what happened to the $90,000 from the sale of Apartment 6A, and the funds do not appear in the HDFC's financials. Defendants' affidavits did not address this glaring deficiency.

… An equitable accounting involves a remedy "designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession" … . Available relief includes a personal judgment against the wrongdoer … . Hall v Louis, 2020 NY Slip Op 03268, First Dept 6-11-20

RELIEF NOT AUTHORIZED, CRIMINAL LAW.

TRIAL JUDGE SHOULD NOT HAVE, SUA SPONTE, DECLARED A MISTRIAL TO ACCOMMODATE A JUROR'S WEEKEND PLANS; WRIT OF PROHIBITION GRANTED; RETRIAL BARRED; INDICTMENT DISMISSED (FIRST DEPT).

The First Department, granting petitioner's application for a writ of prohibition and dismissing the indictment, determined the trial court should not have, sua sponte, declared a mistrial to accommodate a juror's weekend travel plans. Retrial was barred:

The trial court was not compelled by manifest necessity to declare a mistrial and terminate the proceedings …, and accordingly, retrial is barred under the Double Jeopardy Clauses of the Federal and New York State Constitutions … . It was an abuse of discretion to declare a mistrial in order to accommodate a juror's weekend travel plans, including a Friday, which she belatedly informed the court about during deliberations, where the court, as requested by defendant, reasonably could have directed the juror to report for deliberations the following day, and the court also failed to confirm that the jury was hopelessly deadlocked at the time … . Matter of Bannister v Wiley, 2020 NY Slip Op 00522, First Dept 1-28-20

RELIEF NOT AUTHORIZED, FAMILY LAW.

FAMILY COURT, SUA SPONTE, SHOULD NOT HAVE DISMISSED INCARCERATED FATHER'S PETITION ALLEGING MOTHER'S NONCOMPLIANCE WITH AN ORDER MANDATING COMMUNICATION WITH THE CHILD WITHOUT HOLDING A HEARING (THIRD DEPT).

The Third Department, reversing Family Court, should not have, sua sponte, dismissed, without a hearing, father's petition alleging mother's noncompliance with

provisions of an order requiring communication between child and father, who is incarcerated:

Where, as here, a petition sets forth facts of willful noncompliance which, if established at a hearing would provide a basis for the relief sought, Family Court must afford the petitioner an opportunity to be heard … . The father alleged that he is being denied his routine monthly phone call, as well as calls at Christmas and the child's birthday, as required by the consent order. Accepting the representations from counsel for the mother and the attorney for the child that missed calls were made up and that the child no longer wishes to communicate with the father and chooses not to respond to his correspondence, Family Court concluded that there were no contested facts and dismissed the petition. In doing so, the court failed to address the mother's obligation under the consent order to encourage the child to communicate with the father. Whether she failed to do so as alleged remains a disputed contention necessitating relevant testimony, not simply the arguments of counsel. Nor did the court address the father's claim that the mother failed to provide updated photographs and school records. In our view, the court erred in dismissing the petition without a hearing … . Matter of Shannon X. v Koni Y., 2020 NY Slip Op 01215, Third Dept 2-20-20

RELIEF NOT AUTHORIZED, RELIEF NOT REQUESTED, FAMILY LAW.

SUPREME COURT SHOULD NOT HAVE GRANTED SOLE CUSTODY TO FATHER, SHOULD NOT HAVE SANCTIONED MOTHER FOR PERJURY ALLEGEDLY COMMITTED IN A DIFFERENT COURT PROCEEDING, AND SHOULD NOT HAVE ORDERED RELIEF NOT REQUESTED BY A PARTY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined: (1) father should not have been awarded sole custody of the children for 60 days because no change of circumstances was alleged or demonstrated; (2) the court should not have, sua sponte, directed a child be deprived of cell phone and other electronic devices and be barred from outside-the-home activities; (3) the court should not have directed mother to pay a fine to father for perjury; (4) the court did not have the authority to

sanction mother for frivolous conduct (perjury); (5) the court should not have awarded attorney's fees to father:

… [T]he court summarily punished the mother by sanctioning her after it determined that she committed perjury during her testimony before a Judicial Hearing Officer in Family Court with respect to the temporary order of protection and during her testimony at the hearing on the petition before Supreme Court. Assuming, arguendo, that perjury would support a finding of contempt, we conclude that the court could not properly find the mother in criminal contempt based on her testimony in Family Court, nor could the court summarily punish the mother for civil or criminal contempt based on that testimony, inasmuch as it occurred out of the court's "immediate view and presence" … . Insofar as the order may be deemed to sanction the mother for civil or criminal contempt that occurred in the presence of Supreme Court, we conclude that, because "due process requires that . . . the contemnor be afforded an opportunity to be heard at a meaningful time and in a meaningful manner' " … , and the court failed to provide notice that it was considering finding the mother in contempt or an opportunity to be heard thereon, the court erred in imposing such sanction … . …

Assuming, arguendo, that sanctions for frivolous conduct may be based on a party's perjury, we conclude that the regulation permitting the imposition of such sanctions specifically provides that it "shall not apply to . . . proceedings in the Family Court commenced under article . . . 8 of the Family Court Act" … . …

In awarding attorney's fees to the father, the court did not state, and we cannot determine on this record, whether it did so based upon the custodial stipulation between the parties or pursuant to statute. Consequently, we are unable " to determine whether the award was within the proper exercise of the court's discretion' " … . Ritchie v Ritchie, 2020 NY Slip Op 03316, Fourth Dept 6-12-20

RELIEF NOT AUTHORIZED, FAMILY LAW.

FAMILY COURT ALLOWED MOTHER TO TESTIFY BY TELEPHONE WITHOUT WARNING HER A NOTARY SHOULD BE PRESENT SO SHE COULD BE SWORN AND THEN, SUA SPONTE, REJECTED MOTHER'S TESTIMONY BECAUSE IT WAS NOT SWORN; NEW HEARING ORDERED (THIRD DEPT).

The Third Department, reversing Family Court in this child support violation proceeding, determined that mother's testimony by telephone should not have been rejected, sua sponte, because it was unsworn. Family Court allowed mother to testify and mother, who was facing incarceration for the child-support violation, had not been warned to have a notary present so her testimony could be sworn:

In noting the lack of a notary present with the mother to swear her in, Family Court correctly identified a critical issue about to unfold at the hearing, but then took no timely corrective action to address the issue, permitted the unsworn questioning to occur and then, in its written decision, found fault with the very unsworn testimony methodology that it had permitted to occur at the hearing. The correct course of action would have been for the court to explain up front that, if the mother wished to testify, she would have to do so under oath and then administer the oath itself if the mother had not made other suitable arrangements. Given that the mother was facing a potential period of incarceration of up to six months in the event that Family Court determined that her failure to pay child support was willful (see Family Ct. Act § 454 [3] [a]), the mother's testimony was essential to the court's determination as to whether she had had the ability to pay or willfully disobeyed the prior support order. Thus, having permitted the mother to give unsworn testimony telephonically, it was error for Family Court to thereafter sua sponte rule, nearly 1½ months after the hearing, that it would not credit the mother's testimony given that it was not sworn. Matter of Burnett v Andrews-Dyke, 2020 NY Slip Op 03838, Third Dept 7-9-20

RELIEF NOT AUTHORIZED, FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE, SUA SPONTE, TERMINATED MOTHER'S PARENTAL RIGHTS ON MENTAL-ILLNESS GROUNDS IN THE ABSENCE OF THE STATUTORILY-REQUIRED PSYCHOLOGICAL EVALUATION (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court should not have terminated mother's parental right on mental-illness grounds without the results of the statutorily-required examination. The psychologist appointed to evaluate mother (Horenstein) did not do so and rendered his opinion based upon a review of records of her hospitalization:

Pursuant to Social Services Law § 384-b (6) (e), the court is required to order the parent, alleged to be mentally ill, to be examined by a qualified psychiatrist or psychologist and shall take testimony from the appointed expert … . Significantly, paragraph (c) of subdivision 6 prohibits a determination as to the legal sufficiency of the proof until such testimony is taken … . An exception exists "[i]f the parent refuses to submit to such court-ordered examination, or if the parent renders himself [or herself] unavailable . . . by departing from the state or by concealing himself [or herself] therein" … . In such instance, "the appointed psychologist or psychiatrist, upon the basis of other available information, . . . may testify without an examination of such parent, provided that such other information affords a reasonable basis for his [or her] opinion" … . * * *

… [W]e conclude that Family Court erred in proceeding with the termination of respondent's parental rights without the statutorily-required examination. Horenstein pointed out that there was no basis to find that respondent refused to be evaluated. Nor did respondent make herself unavailable "by departing from the state or by concealing [herself] therein" … . To the contrary, her placement in CDPC was involuntary and, despite her release by December 1, 2017, no further attempt was made to schedule an evaluation. Because the statutory exception does not apply, Family Court lacked authority to determine the legal sufficiency of the proof without a contemporaneous evaluation … . Even though respondent raised no objection at the hearing, this statutory mandate requires that we remit the matter to Family Court

for a new hearing and determination … . Matter of Rahsaan I. (Simone J.), 2020 NY Slip Op 01212, Third Dept 2-20-20

RELIEF NOT AUTHORIZED, FORECLOSURE.

JUDGE'S SUA SPONTE DISMISSAL OF THE FORECLOSURE COMPLAINT WAS NOT WARRANTED; NO EXTRAORDINARY CIRCUMSTANCES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion to vacate the sua sponte dismissal of the foreclosure complaint should have been granted:

… [I]n a status conference order … , the Court Attorney Referee … directed the plaintiff to file an application seeking an order of reference by the date of the final status conference. Following the final status conference … , the Court Attorney Referee … determined that the plaintiff failed to show good cause for its failure to move for an order of reference as directed, and recommended that the action be dismissed. … [T]he Supreme Court directed dismissal of the complaint. …

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … . Here, the Supreme Court was not presented with any extraordinary circumstances warranting a sua sponte dismissal of the complaint … . Indeed, at the time the plaintiff was directed to file an application for an order of reference, an order of reference, as well as a judgment of foreclosure and sale, had already been issued. Bank of N.Y. v Ramirez, 2020 NY Slip Op 05024, Second Dept 9-23-20

RELIEF NOT AUTHORIZED, FORECLOSURE.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT IN THIS FORECLOSURE ACTION, THEREBY DEPRIVING PLAINTIFF OF AN OPPORTUNITY TO BE HEARD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion to vacate the default in this foreclosure action should have been granted. Supreme Court had, sua sponte, dismissed the complaint without affording plaintiff an opportunity to be heard:

Following the plaintiff's failure to move for an order of reference … , the Court Attorney Referee found … that the plaintiff failed to show good cause for its failure to move for the order of reference as directed and recommended that the action be dismissed. … Supreme Court directed dismissal of the action.

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … . As no such extraordinary circumstances were present in this case, we disagree with the Supreme Court's determination to sua sponte direct dismissal of the complaint, without affording the plaintiff notice and opportunity to be heard … , which "amounted to a denial of the plaintiff's due process rights" … . Accordingly, the Supreme Court should have granted those branches of the plaintiff's motion which were to vacate the October 4, 2016, order and to restore the action to active status … . Deutsche Bank Natl. Trust Co. v Winslow, 2020 NY Slip Op 01325, Second Dept 2-26-20

RELIEF NOT AUTHORIZED, MENTAL HYGIENE LAW.

JUDGE SHOULD NOT HAVE, SUA SPONTE, TERMINATED THE GUARDIANSHIP OF AN INCAPACITATED PERSON WITHOUT HOLDING A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, terminated the guardianship of an incapacitated person (IP) without holding a hearing:

In April 2016, Fanny K. commenced this proceeding pursuant to Mental Hygiene Law article 81 seeking to be appointed as the guardian to manage Angeliki K.'s property located in Greece. After a hearing, the Supreme Court determined that Angeliki K. (hereinafter the IP) was incapacitated within the meaning of Mental Hygiene Law article 81 and appointed Fanny K. (hereinafter the guardian) as the guardian of her property. In September 2018, due to the IP's health problems and resultant inability to communicate in English, the IP was admitted to an assisted living and rehabilitation facility in Athens, Greece. In November 2018, the guardian moved for leave to change the IP's place of abode from New York to the assisted living and rehabilitation facility, with the IP continuing to maintain her permanent residence in New York. The court, without a hearing, denied the motion and, sua sponte, terminated the guardianship due to a lack of a continuing nexus between the guardianship and New York.

The Supreme Court should not have, sua sponte, terminated the guardianship, without a hearing, as a guardianship may be terminated "only on application of a guardian, the incapacitated person, or any other person entitled to commence a proceeding under Mental Hygiene Law article 81 with a hearing on notice" (… see Mental Hygiene Law §§ 81.36[b], [c] …). Matter of Angeliki K. (Fanny K.), 2020 NY Slip Op 02786, Second Dept 5-13-20

RELIEF NOT AUTHORIZED, NEGLIGENCE.

DEFENDANT DEFAULTED; SUPREME COURT SHOULD NOT HAVE CONSIDERED LIABILITY ISSUES AT THE INQUEST TO DETERMINE DAMAGES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the court should not have considered issues of liability because defendant had defaulted and thereby admitted liability:

In this action, inter alia, to recover damages for personal injuries, the defendant failed to appear or answer the complaint. In an order … , the Supreme Court granted the plaintiff's unopposed motion for leave to enter a default judgment against the defendant and directed an inquest on the issue of damages. After conducting the inquest, the court … determined that the plaintiff had failed to establish, prima facie, that the defendant was negligent and that her negligence was a substantial factor in causing the plaintiff's injuries, and thereupon, sua sponte, directed the dismissal of the complaint.

By defaulting, the defendant admitted "all traversable allegations in the complaint, including the basic allegation of liability" … . As such, the sole issue to be determined at the inquest was the extent of the damages sustained by the plaintiff, and the Supreme Court should not have considered issues of liability … . Arluck v Brezinska, 2020 NY Slip Op 00839, Second Dept 2-5-20

RELIEF NOT AUTHORIZED, REAL PROPERTY TAX.

AFTER CONVERTING THE ARTICLE 78 PETITION TO A COMPLAINT THE JUDGE SHOULD NOT HAVE TREATED THE MOTION TO DISMISS AS A SUMMARY JUDGMENT MOTION WITHOUT NOTIFYING THE PARTIES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge, after converting the article 78 petition to a complaint, should not have, sua sponte, dismissed the complaint without notifying the parties:

… [T]he Supreme Court denied the Comptroller's motion to dismiss, and, pursuant to CPLR 103(c), converted the article 78 petition into a complaint asserting a declaratory judgment cause of action. Upon reaching the merits of the plaintiff's complaint, the court sua sponte denied the plaintiff declaratory relief and directed dismissal of the complaint. …

Upon converting the article 78 petition into a complaint, the Supreme Court erred in reaching the merits of the complaint, and directing its dismissal. Having converted the petition to a complaint, the court could only reach the merits by giving the parties adequate notice that it was going to treat the defendant's pre-answer motion to dismiss as one for summary judgment (see CPLR 3211[c] …). The defendant had not served an answer to either the petition or the complaint, and therefore, any motion for summary judgment would have been premature (see CPLR 3212[a]). Moreover, the record does not establish that the parties deliberately charted a summary judgment course … . Under these circumstances, the court's determination on the merits of the complaint was premature. Matter of Gorelick v Suffolk County Comptroller's Off., 2020 NY Slip Op 05048, Second Dept 9-23-20

RELIEF NOT AUTHORIZED, STIPULATION, PENALTIES.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, INCREASED A PENALTY TO WHICH THE PARTIES HAD AGREED IN A SO-ORDERED STIPULATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge, sua sponte, should not have increased a penalty to which the parties had stipulated:

"A so-ordered stipulation is a contract between the parties thereto and as such, is binding on them and will be construed in accordance with contract principles and the parties' intent" … . "When an agreement between parties is clear and unambiguous on its face, it will be enforced according to its terms and without resort to extrinsic evidence" … . Accordingly, a court "should not, under the guise of contract interpretation, 'imply a term which the parties themselves failed to insert' or otherwise rewrite the contract" … .

Here, we disagree with the Supreme Court's sua sponte determination to change the $1,000 per week penalty set forth in the 2013 stipulation … . Although the New York City Landmarks Preservation Law authorizes a penalty of up to $5,000 per day … , the parties expressly agreed to a different penalty in their 2013 stipulation. Thus, the court should not have "rewritten" the terms of the 2013 stipulation by changing the amount of the penalty agreed to by the parties. City of New York v Quadrozzi, 2020 NY Slip Op 07856, Second Dept 12-23-20

RELIEF NOT AUTHORIZED, SUMMARY JURY TRIAL.

TRIAL COURT'S DECLARING A MISTRIAL VIOLATED THE PARTIES' STIPULATION PURSUANT TO THE SUMMARY JURY TRIAL RULES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the trial should not have, sua sponte, declared a mistrial in this summary jury trial (SJT) in an attempt to correct an evidentiary error. The mistrial violated the parties' STJ stipulation which constitutes a binding contract:

The SJT rules to which the parties stipulated provide, among other things, that "[p]arties agree to waive any motions for directed verdicts as well as any motions to set aside the verdict or any judgment rendered by said jury" and that the "Court shall not set side any verdict or any judgment entered thereon, nor shall it direct that judgment be entered in favor [of] a party entitled to judgment as a matter of law, nor shall it order a new trial as to any issues where the verdict is alleged to be contrary to the weight of the evidence" … .

The court erred in sua sponte declaring a mistrial and setting aside the verdict. While this was an attempt to correct an admittedly erroneous evidentiary ruling, the parties' stipulation to a summary jury trial, subject to the applicable rules and procedures for Bronx County, was a legally binding contract … . Since the summary jury trial rules for Bronx County do not provide for any means to correct errors of law committed during trial, the court exceeded the boundaries of the parties' agreement by setting aside the verdict, regardless of whether it in fact did so on its own initiative in the interest of justice … .

… [T]his holding does not proscribe post-trial motions of any kind in connection with summary jury trials; rather, it abides by the parties' own proscriptions made at the time that they stipulated to proceed with a summary jury trial. There was nothing barring the parties from stipulating to reserve their right to appeal or move to set aside the verdict on the ground of an error of law. Vargas v LaMacchia, 2020 NY Slip Op 00556, First Dept 1-28-20

RELIEF NOT REQUESTED, CANCELLATION OF MORTGAGE.

PLAINTIFF SOUGHT ONLY CANCELLATION OF A MORTGAGE; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, CANCELLED THE NOTE AS WELL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, granted relief that was not asked for by the plaintiff. Plaintiff sought cancellation and discharge of a mortgage pursuant to Real Property Actions and Proceedings Law (RPAPL) 1501(4). The judge cancelled the mortgage and the note:

"The court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" … . Here, the plaintiff only sought cancellation and discharge of the subject mortgage, not cancellation of the note. The Supreme Court should not have granted additional relief sua sponte … . We note that the plaintiff lacked standing to seek cancellation of the note, as it was not a party to it. Trenton Capital, LLC v Bank of N.Y. Mellon, 2020 NY Slip Op 03416, Second Dept 6-17-20

RELIEF NOT REQUESTED, CLASS ACTIONS.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, GRANTED RELIEF NOT REQUESTED IN PLAINTIFFS' UNOPPOSED MOTION AND SHOULD NOT HAVE CONSIDERED EVIDENCE NOT BEFORE IT; THE ORDER SETTLING A CLASS ACTION FOR UNPAID WAGES AND OVERTIME SHOULD NOT HAVE DECLARED INVALID CERTAIN OPT-OUT STATEMENTS WHICH WERE NOT REFERRED TO IN PLAINTIFFS' MOTION AND WERE NOT OTHERWISE BEFORE THE COURT (SECOND DEPT).

The Second Department, reversing Supreme Court in this class action seeking unpaid wages and overtime, determined Supreme Court should not have. sua sponte, declared certain opt-out statements (opting out of the class action settlement) invalid because the issue was not raised by the plaintiff's motion and the opt-out statements were not properly before the court:

Pursuant to the February 2018 order, all class members who did not opt out were permanently enjoined from asserting, pursuing, and/or seeking to reopen claims that were released pursuant to the settlement agreement. The February 2018 order also contained a handwritten provision declaring that "[t]he opt outs received on 1/26/18 from Lee Litigation Group are deemed invalid as they were dated prior to the Class Notice which was sent 12/27/17, and do not contain the required opt-out language pursuant to the Class-Notice ordered by this court on November 22, 2017." Such relief was not sought in the motion filed by the plaintiffs nor was it contained in the proposed order submitted to the court by the plaintiffs' counsel. …

CPLR 908 provides that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court," and that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." Contrary to the plaintiffs' contention, the Supreme Court should not have, sua sponte, declared invalid certain opt-out statements that were not part of the plaintiffs' unopposed motion and which relief was not requested in the motion. "[A] court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" … . Here, the court strayed from this principle … . The relief awarded by the court, sua sponte, in the handwritten provision in the February 2018 order is "dramatically unlike" the relief sought by the plaintiffs and was prejudicial to the appellants … . Moreover, the opt-out statements referred to in the February 2018 order were not among the exhibits submitted on the plaintiffs' motion, and therefore were not properly before the court for consideration … . Robinson v Big City Yonkers, Inc., 2020 NY Slip Op 00447, Second Dept 1-22-20

RELIEF NOT REQUESTED, CONTRACTS, PENALTIES.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, DETERMINED THE PROVISION OF AN "AGREEMENT OF PURCHASE AND SALE OF STOCK" WHICH CALLED FOR RECOVERY OF DOUBLE ATTORNEYS FEES BY THE PREVAILING PARTY IN LITIGATION WAS AN UNENFORCEABLE PENALTY (SECOND DEPT).

The Second Department determined Supreme Court should not have, sua sponte, held that the provision of the "Agreement of Purchase and Sale of Stock" (PSA) which awarded double attorney's fees if litigation resulted from a breach was an unenforceable penalty. The decision, which includes legal analysis well worth reading, is a complex discussion of the covenant not to compete and the nonsolicitation agreement which is too detailed and fact-specific to summarize here. There is an extensive dissent. With respect to the "double attorney's fees" provision, the court wrote:

We disagree with the Supreme Court's sua sponte determination that the provision of the PSA, which, in the event of litigation, allows for a recovery of double the amount of attorneys' fees expended by the substantially prevailing party, is an unenforceable penalty. When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms … . Paragraph 10.11 of the PSA clearly sets forth the intent of the parties, two sophisticated businesspeople with the benefit of counsel, that, should litigation arise out of the PSA, the "substantially prevailing party" is entitled to two times reasonable attorneys' fees. Where, as here, "there is no deception or overreaching" in the making of such agreement, the agreement should be enforced as written … . Moreover, while each party asserted in the Supreme Court, and asserts on appeal, that he should prevail and be treated as the prevailing party for the purpose of paragraph 10.11, neither party contended in the Supreme Court that the double attorneys' fees provision of paragraph 10.11 should not be enforced. Loughlin v Meghji, 2020 NY Slip Op 05196, Second Dept 9-30-20

RELIEF NOT REQUESTED, CONTRACTS.

JUDGE SHOULD NOT HAVE, SUA SPONTE, APPOINTED A RECEIVER BECAUSE THAT RELIEF WAS NOT REQUESTED BY A PARTY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, appointed a receiver and should not have referred an issue to a court attorney referee in this dispute between plaintiff condominium boards and homeowners association and their management company and attorney. The complaint alleged breach of contract and negligence:

The Supreme Court improvidently exercised its discretion in, sua sponte, appointing a receiver to manage the plaintiff entities, since the complaint did not seek the appointment of a receiver, no "person having an apparent interest" in the plaintiff entities sought such relief, and there is no evidence that such a drastic remedy was warranted (CPLR 6401[a] …).

The Supreme Court should not have referred the issue of which Board of Managers and/or which management company shall be implemented to manage the affairs of the plaintiffs to a court attorney referee to hear and report, since the defendants lack standing to challenge the alleged violations of the plaintiffs' bylaws in the elections of new board members (see N-PCL 618 …). Further, the reference of the issue of attorney's fees was premature … . Board of Mgrs. of Golfview Condominium I v Island Condo Mgt. Corp., 2020 NY Slip Op 02070, Second Dept 3-25-20

RELIEF NOT REQUESTED, FAMILY LAW.

COURT SHOULD NOT HAVE DISMISSED, SUA SPONTE, FATHER'S MODIFICATION OF CUSTODY PETITION FOR FAILURE TO STATE A CAUSE OF ACTION BECAUSE MOTHER DID NOT REQUEST THAT RELIEF; THE THIRD DEPARTMENT CONSIDERED AND DENIED MOTHER'S MOTION FOR SUMMARY JUDGMENT (THIRD DEPT).

The Third Department, reversing Family Court, determined the judge, sua sponte, should not have dismissed father's modification of custody petition for failure to state a cause of action because mother did not request that relief. The Third Department went on to consider mother's motion for summary judgment and deny it:

"[A] motion for summary judgment may be utilized in a Family Ct Act article 6 proceeding, but such a motion should be granted only when there are no material facts disputed sufficiently to warrant a trial" … . "In a custody modification proceeding, the controlling 'material fact' is whether or not there is a change in circumstances so as to warrant an inquiry into whether the best interests of the children would be served by modifying the existing custody arrangement" … .

Here, the mother failed to meet her initial summary judgment burden. There can be no dispute that only five months had elapsed since entry of the March 2018 order and, as such, the "automatic" change in circumstances provision incorporated in that order had not been triggered. The father, however, sought modification based upon several other alleged changes in circumstance, including that the mother had been disparaging the father in front of the children in violation of the March 2018 order

and that she is living in a homeless shelter. The mother, in her motion for summary judgment, makes no mention of these allegations or otherwise attempts to refute them in any way. Matter of Anthony F. v Christy G., 2020 NY Slip Op 01228, Third Dept 2-20-20

RELIEF NOT REQUESTED, FORECLOSURE.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, REVOKED THE ACCELERATION OF THE DEBT IN THIS FORECLOSURE CASE BECAUSE PLAINTIFF DID NOT SEEK THAT RELIEF (SECOND DEPT).

The Second Department noted that Supreme Court in this foreclosure action should not have, sua sponte, revoked the previous acceleration of the debt because plaintiff did not request that relief:

… [T]he Supreme Court should not have revoked the previous acceleration of the mortgage debt and directed that the mortgage remain an installment contract, inasmuch as the plaintiff did not seek such relief in its motion or cross-move for it in response to the defendant's cross motion … . CitiMortgage, Inc. v Salko, 2020 NY Slip Op 00566, Second Dept 1-29-20

RELIEF NOT REQUESTED, FORECLOSURE.

ALTHOUGH THE MOTION TO VACATE THE JUDGMENT OF FORECLOSURE FOR LACK OF PERSONAL JURISDICTION WAS PROPERLY GRANTED FOR THE MOVING DEFENDANT, THE JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED THE SAME RELIEF TO DEFENDANTS WHO DID NOT SO MOVE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, noted that the judge should not have, sua sponte, vacated the judgment of foreclosure as against those defendants who did not move for that relief:

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … . "[T]he defense of lack of jurisdiction based on improper service is personal in nature and may only be raised by the party improperly served'" … . Here, Hickson was the only defendant who moved to vacate the judgment of foreclosure and sale and to dismiss the complaint for lack of personal jurisdiction. Accordingly, under the circumstances of this case, the Supreme Court had no basis to, sua sponte, vacate so much of the judgment of foreclosure and sale as was against the defendants other than Hickson and to direct the dismissal of the complaint insofar as asserted against those defendants for lack personal jurisdiction. Lehman Bros. Bank v Hickson, 2020 NY Slip Op 04932, Second Dept 9-16-20

RELIEF NOT REQUESTED, RELIEF NOT AUTHORIZED, FORECLOSURE.

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).

The Second Department determined the judge should have, sua sponte, dismissed the complaint in this foreclosure action on the ground the bank did not comply with the notice requirements of RPAL 1304. The defendants defaulted and failure to comply with RPAPL 1304 is not a jurisdictional defect. Therefore it must be raised as a defense before a judge can rule on it:

In this action to foreclose a mortgage, in which the defendants failed to appear or answer the complaint, the Supreme Court should have granted the plaintiff's motion for leave to enter a default judgment and for an order of reference, and should not have, sua sponte, directed dismissal of the complaint based on its determination that the plaintiff failed to establish that it complied with RPAPL 1304 … . Therefore, a plaintiff is not required to disprove the defense unless it is raised by defendants, and

in this case the defendants failed to appear in the action or answer the complaint … . Chase Home Fin., LLC v Guido, 2020 NY Slip Op 07854, Second Dept 12-23-20

RELIEF NOT REQUESTED, RELIEF NOT AUTHORIZED, FORECLOSURE.

DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION GRANTED IN THE INTERESTS OF SUBSTANTIAL JUSTICE; THE EVIDENCE SUGGESTED DEFENDANT WAS THE VICTIM OF A SCHEME TO DEFRAUD; SUPREME COURT, HOWEVER, SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT (SECOND DEPT).

The Second Department determined defendant's decedent's (Renda's) motion to vacate a default judgment in this foreclosure action should have been granted in the interests of substantial justice. There was evidence Renda was the victim of a scheme to defraud and foreclosure triggers the equitable powers of the court. Supreme Court should not have, sua sponte, dismissed the complaint, however:

… [W]e find that the defendant is entitled to vacatur of her default in the interests of substantial justice. "In addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice" … . "A foreclosure action is equitable in nature and triggers the equitable powers of the court" … . "Once equity is invoked, the court's power is as broad as equity and justice require" … .

Here, the evidence submitted strongly suggests that Renda was the victim of a scheme to defraud … .

… [T]he Supreme Court erred in, sua sponte, directing dismissal of the complaint. Here, there were no extraordinary circumstances warranting the sua sponte dismissal, and there is no indication that the court gave the parties an opportunity to be heard regarding the dismissal of the complaint … . Caridi v Tanico, 2020 NY Slip Op 06236, Second Dept 11-4-20

RELIEF NOT REQUESTED, RELIEF NOT AUTHORIZED, MUNICIPAL LAW.

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).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, imposed an injunction on defendant and determined issues of fact without a motion before the court and without holding a hearing:

The Supreme Court, after a status conference … , issued an order, sua sponte, … which, … directed the defendant … to take all steps necessary to obtain a permit from the Department of Buildings to complete the work on one of the subject properties and expedite repairs to that property, including the submission of new plans by the defendant … .

Since no motion was pending before it, the Supreme Court should not have, sua sponte, and without a hearing, imposed an injunction on the defendant and determined issues of fact … . "A court is generally limited to noticed issues that are the subject of the motion before it" … . … The plaintiffs did not move for an injunction … and the court did not hold a hearing … . City of New York v Quadrozzi, 2020 NY Slip Op 07857, Second Dept 12-23-20

RELIEF NOT REQUESTED, NEGLIGENCE.

DEFENDANTS' MOTION TO DISMISS CLAIMS NOT INCLUDED IN THE NOTICE OF CLAIM PROPERLY GRANTED; MOTION TO AMEND THE NOTICE OF CLAIM AND MOTION FOR LEAVE TO FILE A LATE NOTICE PROPERLY DENIED; JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE CLAIM FOR LOSS OF SERVICES BECAUSE THAT RELIEF WAS NOT REQUESTED (SECOND DEPT).

The Second Department determined defendants' motion to dismiss claims that were not in the notice of claim was properly granted, and plaintiffs' motions to amend the

notice of claim and for leave to file a late notice of claim were properly denied. The Second Department noted that the loss of services claim should not have been dismissed (sua sponte) because that relief was not requested. The action alleged negligent supervision by the school. Plaintiff student was allegedly pushed into a wall during gym class by another student who had been bullying her for some time:

The plaintiffs' new claims of other purported bullying incidents and Dupper's [plaintiff-student's father's] claim that he suffered stress, anxiety, and depression as a result of the … incident constitute new theories of liability which were not included in the notice of claim and should be dismissed … . …

The plaintiffs' proposed amendments to the notice of claim add substantive new facts and new theories of liability not set forth in the original notice of claim and which are not permitted as late filed amendments to a notice of claim under General Municipal Law § 50-e(6) … . …

… [T]he plaintiffs' failure to include a proposed notice of claim with their cross motion alone was a sufficient basis for denying that branch of the cross motion … . C.D. v Goshen Cent. Sch. Dist., 2020 NY Slip Op 04916, Second Dept 9-16-20