

NEW YORK APPELLATE DIGEST, LLC

A Succinct Collection of the Salient Issues Addressed in the Civil Procedure Decisions Released by our New York State Appellate Courts in January 2021. The Citations Link to the Decisions on the Official New York Courts Website.

The Full Decision-Summaries Are Available in the January 2021 Civil Procedure Update Pamphlet.

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Civil Procedure
Practice Newsletter
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APPEALS (APPELLATE RULING IS LAW OF THE CASE ON REMITTAL).

THE PRIOR APPELLATE DECISION DIRECTING THE COLLECTION OF MORE EVIDENCE IS THE LAW OF THE CASE; THE DIRECTION WAS NOT COMPLIED WITH BY SUPREME COURT UPON REMITTAL (SECOND DEPT).

Matter of Jewish Press, Inc. v New York City Dept. of Educ., 2021 NY Slip Op 00173, Second Dept 1-13-21

Practice Point: Upon remittal after appeal, the lower court must precisely follow the instructions of the appellate court or the matter will be reversed again.

BUSINESS RECORDS, CRITERIA FOR ADMISSION AT SUMMARY JUDGMENT.

DEFENDANT ATTORNEY’S AFFIDAVIT IN SUPPORT OF ADMITTING LAW-FIRM BUSINESS RECORDS DID NOT INDICATE THE AFFIANT WAS FAMILIAR WITH THE RECORD KEEPING PRACTICES AND PROCEDURES OF THE LAW FIRM; THEREFORE THE COURT SHOULD NOT HAVE CONSIDERED THE RECORDS IN THE SUMMARY JUDGMENT PROCEEDINGS (SECOND DEPT).

Anghel v Ruskin Moscou Faltischek, P.C., 2021 NY Slip Op 00403, Second Dept 1-27-21

Practice Point: At the summary judgment stage, when the admissibility of business records must be demonstrated by affidavit, the affiant must be a person with personal knowledge of the business’s record-keeping practices and procedures.

CPLR 205 (a) (MOTIONS).

CPLR 205 (A), WHICH ALLOWS AN ACTION TO BE REFILED WITHIN SIX MONTHS OF DISMISSAL, DOES NOT APPLY TO MOTIONS; THE DEFENDANTS WERE AGGRIEVED BY AN ORDER WHICH STAYED THE PROCEEDINGS FOR FURTHER SUBMISSIONS AND THEREFORE COULD APPEAL THE ORDER (THIRD DEPT).

Trustco Bank v The Preserve Dev. Group Co., LLC, 2021 NY Slip Op 00350, Third Dept 1-21-21

Practice Point: CPLR 205 (a), which allows an action to be refiled within six months of a dismissal which is not on the merits, does not apply to motions which are not dismissed on the merits.

DEFAULT JUDGMENTS (COUNTERCLAIMS).

THE CPLR 3215 REQUIREMENT THAT PROCEEDINGS TO TAKE A DEFAULT JUDGMENT BE COMMENCED WITHIN ONE YEAR OF THE DEFAULT APPLIES TO COUNTERCLAIMS; COUNTERCLAIM DISMISSED AS ABANDONED (SECOND DEPT).

Bazile v Saleh, 2021 NY Slip Op 00286, Second Dept 1-20-21

Practice Point: The one-year period for taking a default judgment applies to counterclaims as well as causes of action in a complaint.

DEFAULT JUDGMENTS (ONE-YEAR DEADLINE).

THE ONE-YEAR PERIOD FOR TAKING A JUDGMENT RUNS FROM THE DEFAULT AFTER THE FILING AND SERVING OF THE ORIGINAL COMPLAINT, NOT A SUBSEQUENT AMENDED COMPLAINT (FIRST DEPT).

MTGLQ Invs., L.P. v Shay, 2021 NY Slip Op 00237, First Dept 1-14-21

Practice Point: The one-year period for taking a default judgment runs from the default on the original complaint, not a subsequent amended complaint. The one-year period cannot, therefore, be extended by filing an amended complaint.

EQUAL ACCESS TO JUSTICE ACT, ATTORNEYS FEES.

BEFORE PETITIONER INMATE’S ARTICLE 78 PETITION WAS CONSIDERED RESPONDENT VOLUNTARILY REVERSED THE GUILTY FINDINGS ON THE PRISON DISCIPLINARY VIOLATIONS; PETITIONER WAS NOT ENTITLED TO ATTORNEY’S FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT UNDER THE “CATALYST THEORY” (THIRD DEPT).

Matter of Clarke v Annucci, 2021 NY Slip Op 00473, Third Dept 1-28-21

Practice Point: New York does not recognize the “catalyst theory” with respect to the Equal Access to Justice Act, meaning that if the desired result of litigation against the state is achieved without a court ruling, attorneys fees paid by the state are not available.

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1501.

THE DEBT WAS ACCELERATED WHEN THE BANKRUPTCY STAY WAS LIFTED; THE FORECLOSURE ACTION WAS THEREFORE TIME-BARRED; DISAGREEING WITH THE 2ND DEPARTMENT, THE DEFENDANTS DID NOT NEED TO INTERPOSE A COUNTERCLAIM TO CANCEL THE MORTGAGE PURSUANT TO RPAPL 1501 (THIRD DEPT).

MTGLQ Invs., L.P. v Wentworth, 2021 NY Slip Op 00064, Third Dept 1-7-21

Practice Point: The Second and Third Departments differ on whether the cancellation or discharge of a mortgage after the statute of limitations for foreclosure has run requires an action or a counterclaim. No action or counterclaim is required in the Third Department.

FORECLOSURE, REFEREE'S REPORT = INQUEST ON DAMAGES.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION WAS BASED UPON BUSINESS RECORDS WHICH WERE NOT PRODUCED AND SHOULD NOT HAVE BEEN CONFIRMED; ALTHOUGH DEFENDANTS DEFAULTED, THE REFEREE'S REPORT FUNCTIONS AS AN INQUEST ON DAMAGES WHICH THE DEFENDANTS CAN CONTEST (SECOND DEPT).

Wilmington Sav. Fund Socy., FSB v Moriarty-Gentile, 2021 NY Slip Op 00328, Second Dept 1-20-21

Practice Point: In a foreclosure action, a defaulting defendant can still contest the amount owed by contesting the referee's report.

JUSTICIABLE CLAIMS.

CLAIMS BY CORRECTIONS OFFICERS SEEKING TO REQUIRE THE DEPARTMENT OF CORRECTIONS TO PROVIDE TRAINING AND EQUIPMENT FOR DEALING WITH VIOLENT PRISONERS WERE NOT JUSTICIABLE (FIRST DEPT).

Correction Officers' Benevolent Assn., Inc. v City of New York, 2021 NY Slip Op 00109, First Dept 1-12-21

Practice Point: Where an action does not allege discrimination or violation of fundamental rights, and disposition would require the court to make management and policy decisions on behalf of a governmental agency, the action is not justiciable.

MEDICAL EXAMINATIONS, WAIVER.

ALTHOUGH DEFENDANTS MISSED THE DEADLINE AND THEREBY WAIVED THE RIGHT TO MEDICAL EXAMINATIONS OF PLAINTIFF, THE MOTION TO STRIKE THE NOTE OF ISSUE AND COMPEL AN EXAM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Andujar v Boyle, 2021 NY Slip Op 00400, Second Dept 1-27-21

Practice Point: Although the right to medical examinations of a plaintiff is waived if the court-imposed deadline is missed, if there is an adequate excuse for the delay and no prejudice the court will compel the exam.

SUMMARY JUDGMENT, LATE MOTION, REPLY PAPERS.

DEFENDANTS DID NOT SEEK LEAVE OF COURT TO FILE A LATE MOTION FOR SUMMARY JUDGMENT AND OFFERED AN EXPLANATION FOR THE FIRST TIME IN REPLY PAPERS; THE EXPLANATION SHOULD NOT HAVE BEEN CONSIDERED AND THE MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Rivera v Zouzias, 2021 NY Slip Op 00443, Second Dept 1-27-21

Practice Point: Before attempting to file a late summary judgment motion, ask the court's permission, and demonstrate good cause in the initial moving papers, not in reply.

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