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An Organized Compilation of Summaries of Selected Decisions Addressing Civil Procedure Released by our New York State Appellate Courts in January 2021 and Posted on the New York Appellate Digest Website in January 2021. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header of Any Page to Return There.

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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).

The Second Department, reversing Supreme Court, determined the decision in the prior appeal was the law of the case and Supreme Court did not follow the instruction to collect additional evidence:

In our prior decision and order, we noted that the issue of the burden that would be imposed upon the DOE [Department of Education] to comply with the petitioner's FOIL request and whether the DOE is able to engage an outside professional service to cull the records sought was not addressed by the Supreme Court and could not be resolved on the record before us … . We noted that "[a]mong other things, it is unclear as to how much time would be involved for an employee at each school to review the relevant files. Further, although the petitioner has expressed its willingness to reimburse the [DOE] for reasonable costs involved in having the [DOE's] employees, or an appropriate third party, review and copy the [DOE's] records, there is no information in the record as to what that cost would be or whether the petitioner would in fact be willing to reimburse the [DOE] for the full amount of those costs, once those costs are determined" … . Accordingly, we remitted the matter to the Supreme Court for further proceedings, including additional submissions by the parties … .

Our prior decision and order was law of the case and binding on the Supreme Court … . However, the court failed to conduct further proceedings, including the taking of additional submissions on the issues of burden, cost and reimbursement, in accordance with our decision and order. Accordingly, we reverse the judgment and remit the matter for further proceedings in accordance with our decision and order in Matter of Jewish Press, Inc. v New York City Dept. of Educ. (183 AD3d 731). 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).

The Second Department, reversing Supreme Court, determined defendants failed to lay a proper foundation for the admissibility of business records (the Matter Ledger Card) which purported to describe the legal work done by defendants for for plaintiff:

We agree with the plaintiff that the court should not have considered these documents because the defendants failed to submit them in admissible form … .

The defendants failed to lay a proper foundation for the admissibility of the Matter Ledger Card pursuant to CPLR 4518. "A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" … . [Defendant's] affidavit failed to set forth that he "was personally familiar with [the law firm's] record keeping practices and procedures" and, as a result, failed to lay a proper foundation for the admission of the Matter Ledger Card concerning the plaintiff's payment history … . 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).

The Third Department, reversing Supreme Court, over a dissent, determined CPLR 205 (a), which allows an action to be refiled within six months of dismissal under certain conditions, does not apply to motions. Here the plaintiff sought to bring a second motion for a deficiency judgment pursuant to Real Property Actions and Proceedings Law (RPAPL) 1371 after the first was deemed untimely because it was not served within the 90-day time-frame. The dissenter argued the defendants were not aggrieved by the lower court's order which stayed the proceedings for further submissions and therefore could not appeal:

As an initial matter, plaintiff contends that, because Supreme Court did not ultimately rule on the relief sought — namely a deficiency judgment — and instead issued a stay to allow further submissions from the parties, defendants are not aggrieved by the ruling and the appeal should be dismissed. … We disagree. A party is aggrieved when the court denies the relief it requested or grants relief, in whole or in part, against a party who had opposed the relief … . Here, defendants opposed plaintiff's second motion for a deficiency judgment as untimely. Had Supreme Court agreed, the case would have been dismissed outright, and defendants would have been relieved of any deficiency judgment. Instead, they continue to be involved in litigation and remain exposed to the potential of said judgment and the financial consequences attendant thereto. Defendants are therefore clearly aggrieved by the finding of timeliness by Supreme Court. * * *

… [P]laintiff urges this Court to find the second motion timely by applying CPLR 205 (a), allowing it to file the second motion six months after the denial of the first motion. … Here, the statute provides that "[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . .

may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action" … . An action is defined as "a civil or criminal judicial proceeding" … . CPLR 105 defines an action to include a special proceeding, whereas a motion is defined as "an application for an order" (CPLR 2211). RPAPL 1371 (2) and (3) expressly direct that a motion for a deficiency judgment be made. Motions are not subject to the tolling provision of CPLR 205 (a). Had the Legislature intended to include motions in CPLR 205 (a), it could have done so and its failure to do so, is presumed to be intentional … . 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).

The Second Department noted that the CPLR 3215 requirement that a proceedings to take a default judgment be taken within one year of the default applies to a counterclaim and held that the counterclaim here must therefore be dismissed as abandoned:

CPLR 3215(c) provides that if the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. While counterclaims are not specifically mentioned in CPLR 3215, the statute applies to claims asserted as counterclaims in addition to those set forth in complaints … . "The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory,

inasmuch as courts 'shall' dismiss claims (CPLR 3215[c]) for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned" … . "The failure to timely seek a default may be excused if 'sufficient cause is shown why the complaint should not be dismissed' (CPLR 3215[c]), which requires the party to proffer a reasonable excuse for the delay in timely moving for a default judgment and to demonstrate that the cause of action is potentially meritorious" … . …

Where, as here, a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and "shall" dismiss the claim pursuant to CPLR 3215(c) … . 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).

The First Department, reversing Supreme Court, determined the one-year period for taking a judgment after a default runs from the default after the filing and serving of the original complaint, not the amended complaint:

The mortgage foreclosure action should have been dismissed as against original borrower Melissa Eaton, pursuant to CPLR 3215(c), because plaintiff failed to "take proceedings for the entry of judgment" within one year of Eaton's default. The time to seek a default judgment should be measured from the default in responding to the original, not the amended, complaint … . Although an amended complaint supersedes the original complaint, and therefore requires a new responsive pleading to avoid default … , allowing the filing of an amended complaint to effectively cure a failure to timely move for a default in responding to the original complaint would

create an exception that swallows the rule. Because plaintiff did not move for a default judgment until well after one year after Eaton's default in responding to the original complaint, and because plaintiff fails to offer any excuse for this delay … , dismissal was appropriate under CPLR 3215(c) — notwithstanding plaintiff's inability to bring a new action due to expiration of the statute of limitations … . 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).

The Third Department determined petitioner inmate was not entitled to attorney's fees as a prevailing party pursuant to the Equal Access to Justice Act [EAJA] (CPLR Article 86). Petitioner contested guilty findings on several prison disciplinary violations and brought an Article 78 proceeding. Before the Article 78 petition was considered the respondent reversed the disposition and expunged it from petitioner's prison record. Petitioner then sought attorney's fees as the prevailing party:

Petitioner contends that he is entitled to counsel fees because he prevailed in the litigation under the "catalyst theory." [The catalyst theory posits that a petitioner is a prevailing party if the desired result is achieved because the proceeding brought about the voluntary change in the respondent's conduct … .] * * *

Although this Court has not decided whether it will adopt the catalyst theory in EAJA cases, when this Court has been asked to adopt the catalyst theory in other counsel fee award cases, it has declined to do so as the "United States Supreme Court

has clearly held that a voluntary resolution of a matter lacks the necessary judicial imprimatur to warrant an award of [counsel] fees" … . … [T]he Court of Appeals specifically agreed … . The same reasoning applies here. The change in the legal relationship was accomplished prior to answering the petition, was based on the voluntary actions of the Department of Corrections and Community Supervision, and was "not enforced by a consent decree or judgment of Supreme Court" … . 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).

The Third Department, in a full-fledged opinion by Justice Clark, determined the debt was accelerated when the automatic bankruptcy stay was lifted. Therefore the foreclosure action was untimely and the mortgage was properly cancelled pursuant to RPAP 1501:

… [T]he mortgage was accelerated on December 8, 2011, the date on which the bankruptcy court issued the order lifting the automatic bankruptcy stay as to plaintiff's predecessor in interest and its assignees and/or successors in interest … . By filing a proof of claim in the bankruptcy proceeding and shortly thereafter seeking affirmative relief from the automatic bankruptcy stay, plaintiff's predecessor in interest communicated a clear and unequivocal intent to accelerate the entire mortgage debt … . …

Supreme Court did not err in discharging and canceling the mortgage. RPAPL 1501 (4) states, as relevant here, that, where the statute of limitations period for the commencement of a mortgage foreclosure action has expired, "any person having an estate or interest in the real property subject to such encumbrance may maintain an action . . . to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom" … . Contrary to the Second Department, we do not read RPAPL 1501 (4) as stating that the cancellation and discharge of a mortgage can only be obtained by commencing an action or interposing a counterclaim for such relief … .

… [D]efendants did not interpose a counterclaim seeking to discharge and cancel the mortgage. However, defendants requested, in their answer, dismissal of the complaint and such "other and further relief as [Supreme Court] deem[ed] just and equitable" and thereafter specifically requested in their cross motion that the mortgage be discharged and canceled. 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).

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed because it was based upon business records that were not produced. The court noted that the fact that defendants had defaulted did not preclude them from contesting the amount owed:

… [T]he referee's report should not have been confirmed because it was based upon unproduced business records … . The fact that the defendants defaulted in appearing did not mean that they were precluded from contesting the amount owed … . The referee's report served the function of an inquest on damages, which must be based upon admissible evidence … . 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).

The First Department, reversing Supreme Court, determined the allegations by the plaintiff corrections officers concerning training and equipment for dealing with violent prisoners were not justiciable:

These claims are not justiciable. In seeking an order that would require the Department of Correction (DOC) to make specific decisions on staffing, training, and equipment, plaintiffs would have the courts involved in the management of DOC policy, thereby interfering with the discretion granted to DOC under the New York City Charter … . Unlike the claims brought in Center for Independence of the Disabled v Metropolitan Transp. Auth. (184 AD3d 197 [1st Dept 2020]), plaintiffs' claims, that DOC's current training/equipment scheme for correction officers fails to satisfy the statutory safe workplace requirement, are not well suited for judicial review, because they do not involve the protection of a fundamental right to be free from discrimination but would instead embroil the judiciary in extensive consideration of policy, and the remedy sought would require the courts to take on the improper task of mandating the specifics of DOC's plans and operations. 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.

JURISDICTION, INCONVENIENT FORUM.

FAMILY COURT SHOULD NOT HAVE REFUSED JURISDICTION OVER THIS CUSTODY AND NEGLECT PROCEEDING STEMMING FROM AN INCIDENT DURING A BRIEF VISIT TO TENNESSEE (THIRD DEPT).

The Third Department, reversing Family Court and ordering new proceedings in front of a different judge, in a full-fledged opinion by Justice Clark, determined Family Court completely mishandled this custody matter which involved neglect proceedings in Tennessee stemming from an incident during the family's brief visit there. Family Court had refused to exercise jurisdiction over the matter on inconvenient-forum grounds. On appeal, all parties agreed Family Court had committed reversible errors:

… [T]here was no dispute that the children and their respective parents/custodian had lived in New York for at least six consecutive months prior to the April 2019 commencement of the neglect proceeding in Tennessee, thereby making New York the children's home state … . Thus, pursuant to the UCCJEA, Family Court had jurisdiction over the neglect proceeding commenced in Tennessee … . * * *

The record irrefutably reflects that the children came into emergency care in Tennessee during a brief visit to the state and that, prior to entering care, they had not resided in Tennessee. The children's respective parents/legal custodian reside in New York, as does a half sibling of one of the children. Roughly 850 miles separate the Tennessee court and Chemung County, and the parties have limited financial means to travel to Tennessee to participate in court proceedings or to visit with the children. Additionally, with the exception of DSS, which did not provide an appropriate basis in law for its objection, all parties and the Tennessee court agreed that Family Court should exercise jurisdiction over the dispositional phase of the neglect proceeding. Significantly, evidence regarding the children's best interests and the feasibility of reunifying them with their respective parents and/or petitioner

is in New York, including proof relating to any remedial and rehabilitative services offered to and engaged in by the mother and Jamie A. Any testimony required from witnesses located in Tennessee can be taken by phone. Matter of Diana XX v Nicole YY, 2021 NY Slip Op 00352, Third Dept 1-21-21

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 SHOUD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' motion to strike the note of issue and certificate of readiness and compel a medical examination of plaintiff should have been granted. Although the defendants missed the agreed deadline for the exam, they had an adequate excuse and there was no prejudice:

Although a defendant waives the right to medical examinations of the plaintiff by failing to conduct them within the time period set forth in compliance conference orders … , "under certain circumstances and absent a showing of prejudice to the opposing party, the court may exercise its discretion to relieve a party of a waiver of the right to conduct a physical examination" … . Here, a scheduled medical examination of the plaintiff failed to happen due to a clerical error by the vendor that scheduled the examination. Consequently, the defendants did not have the opportunity to conduct an independent medical examination of the plaintiff. Further, no prejudice was shown by the plaintiff. 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).

The Second Department, reversing Supreme Court, determined defendants late motion for summary judgment should not have been granted. Defendants did not seek permission to make the late motion and only offered an explanation for the delay in reply papers, which should not have been considered:

Pursuant to CPLR 3212(a), unless the trial court directs otherwise, a motion for summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" … . Here, the defendants moved for summary judgment dismissing the complaint more than 120 days after the filing of the note of issue without seeking leave of court or offering an explanation showing good cause for their delay. As a result, the Supreme Court improvidently exercised its discretion in considering the defendants' good cause argument, presented for the first time in reply papers, and in granting their motion … . 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.