

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 March 2021. The Citations Link to the Decisions on the Official New York Courts Website. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website.
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Civil Procedure
Practice Newsletter
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90-DAY DEMAND TO FILE NOTE OF ISSUE, FORECLOSURE.

ALTHOUGH PLAINTIFF BANK IN THIS FORECLOSURE ACTION DID NOT HAVE A JUSTIFIABLE EXCUSE FOR FAILING TO COMPLY WITH THE 90-DAY DEMAND TO FILE A NOTE OF ISSUE PURSUANT TO CPLR 3216, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT).

Chase Home Fin., LLC v Shoumatoff, 2021 NY Slip Op 01537, Third Dept 3-18-21

Practice Point: Even where a party does not have a justifiable excuse for failing to comply with the 90-day demand to file a note of issue, courts still have discretion in fashioning a penalty; dismissal of the complaint is not mandatory pursuant to CPLR 3216.

ANSWER, FAILURE TO REJECT LATE.

THE BANK'S FAILURE TO REJECT THE LATE ANSWER WITHIN 15 DAYS WAIVED THE LATE SERVICE AND DEFAULT (SECOND DEPT).

U.S. Bank N.A. v Lopez, 2021 NY Slip Op 01440, Second Dept 3-10-21

Practice Point: If a party is served with a late answer, the party has 15 days to return the answer with a statement explaining the reasons for rejecting it. Absent a rejection and return, the party waives the late service and the related default.

ARTICLE 78, FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, SUA SPONTE.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IS AN AFFIRMATIVE DEFENSE WHICH CAN BE WAIVED; THE JUDGE, THEREFORE, SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE ARTICLE 78 PETITION ON THAT GROUND; PETITION REINSTATED (SECOND DEPT).

Matter of Bobar v Transit Adjudication Bur., 2021 NY Slip Op 01255, Second Dept 3-3-21

Practice Point: In an Article 78 proceeding, the failure to exhaust administrative remedies is an affirmative defense which is waived if not raised in the answer or a preanswer motion. In other words, it is not necessary to affirmatively allege administrative remedies were exhausted in the petition.

ARTICLE 78/DECLARATORY JUDGMENT.

ALTHOUGH THE ARTICLE 78 PROCEEDING WAS PROPERLY TRANSFERRED TO THE APPELLATE DIVISION, THE RELATED DECLARATORY JUDGMENT ACTION WAS NOT TRANSFERABLE (FOURTH DEPT).

Matter of Blue v Zucker, 2021 NY Slip Op 01924, Fourth Dept 3-26-21

Practice Point: In a hybrid Article 78/declaratory judgment action, even if the Article 78 must be transferred to the Appellate Division because there was an evidentiary hearing, the declaratory judgment aspect can not be transferred.

ATTACHMENT.

THE MOTION FOR AN ORDER OF ATTACHMENT SHOULD NOT HAVE BEEN GRANTED; CRITERIA EXPLAINED (SECOND DEPT).

Cyngiel v Krigsman, 2021 NY Slip Op 01391, Second Dept 3-10-21

Practice Point: An order of attachment must be supported by strong evidence of an intent to defraud underlying the removal, assignment or other disposition property; a suspicion of fraudulent intent is not enough.

BILL OF PARTICULARS, AMENDMENT.

PLAINTIFF SHOULD NOT HAVE BEEN ALLOWED TO AMEND THE BILL OF PARTICULARS AFTER DISCOVERY WAS CLOSED TO RAISE A NEW THEORY OF LIABILITY STEMMING FROM FACTS NOT PREVIOUSLY ALLEGED; DEFENDANT OUT-OF-POSSESSION LANDLORD DEMONSTRATED THE LEASE DID NOT REQUIRE THE LANDLORD TO MAINTAIN THE DOOR WHICH PLAINTIFF ALLEGED CLOSED ON HER HAND (SECOND DEPT).

King v Marwest, LLC, 2021 NY Slip Op 08225, Second Dept 3-17-20

Practice Point: After discovery is complete, the bill of particulars cannot be amended by adding new facts or new theories of liability.

COMPLAINT, DEFECTIVE.

ALTHOUGH THE COMPLAINT WAS DEFECTIVE, AFFIDAVITS AND OTHER EVIDENCE DEMONSTRATE A POTENTIALLY MERITORIOUS CLAIM; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

Ninth Space LLC v Goldman, 2021 NY Slip Op 01853, First Dept 3-25-21

Practice Point: A complaint which does not state a cause of action can be saved by affidavits or other evidence submitted in opposition to the motion to dismiss.

COURT OF CLAIMS, CONTRACT LAW.

THE COURT OF CLAIMS, NOT SUPREME COURT, IS THE PROPER FORUM FOR THIS DECLARATORY JUDGMENT ACTION AGAINST THE STATE (FOURTH DEPT).

Rice v New York State Workers' Compensation Bd., 2021 NY Slip Op 01669, Fourth Dept 3-19-21

Practice Point: If the crux of an action against the state is breach of contract seeking money damages, the Court of Claims is the proper forum even if incidental equitable relief, here a declaratory judgment, is also requested.

DIRECTED VERDICT, COURT OF CLAIMS, ATTORNEYS.

DEFENDANTS WERE NOT ENTITLED TO A DIRECTED VERDICT ON THE EMPLOYMENT DISCRIMINATION CAUSE OF ACTION; DEFENSE COUNSEL’S REMARK ABOUT THE FINANCIAL CONSEQUENCES OF A PLAINTIFF’S VERDICT DEPRIVED PLAINTIFF OF A FAIR TRIAL; THE COURT OF CLAIMS HAS EXCLUSIVE JURISDICTION OVER ACTIONS SEEKING MONEY DAMAGES FROM THE STATE, RELEVANT CAUSES OF ACTION PROPERLY DISMISSED (FOURTH DEPT).

Hubbard v New York State Off. of Mental Health, Cent. N.Y. Psychiatric Ctr., 2021 NY Slip Op 01661, Fourth Dept 3-19-21

Practice Point: After a plaintiff’s verdict, in order to direct a verdict in favor of defendant the judge must find that the plaintiff’s verdict was “utterly irrational,” which was not the case here. There was evidence which supported the jury verdict.

FAMILY LAW, FILING OF OBJECTIONS.

FAILURE TO TIMELY FILE THE OBJECTIONS TO THE SUPPORT MAGISTRATE’S DETERMINATION DID NOT WARRANT DISMISSAL OF THE OBJECTIONS (FOURTH DEPT).

Matter of Sigourney v Santaro, 2021 NY Slip Op 01591, Fourth Dept 3-19-21

Practice Point: The failure to file proof of service of objections to a Support Magistrate’s determination within two days as required by the Family Court Act does not mandate dismissal of the objections, at least where there is no prejudice to the opposing party.

INSTRUMENT FOR THE PAYMENT OF MONEY ONLY.

THE COMMERCIAL LEASE GUARANTEE MET THE DEFINITION OF AN INSTRUMENT FOR THE PAYMENT OF MONEY; THE COVID-19 RESTRICTIONS ON ENFORCEMENT OF COMMERCIAL LEASE GUARANTEES DO NOT APPLY; THE WARRANTY OF HABITABILITY DEFENSE IS NOT AVAILABLE (FIRST DEPT).

iPayment, Inc. v Silverman, 2021 NY Slip Op 01846, First Dept 3-25-21

Practice Point: Here the guarantee in the lease included an unconditional obligation to pay all rent and therefore qualified as an instrument for the payment of money only which can properly be the basis for a motion for summary judgment in lieu of a complaint.

JURORS, REQUEST TO POLL.

Garcia v Rosario, 2021 NY Slip Op 01555, First Dept 3-18-21

Practice Point: It is reversible error to deny a party's request to poll the jury.

MUNICIPAL LAW, NOTICE OF CLAIM, COUNTY LAW.

ALTHOUGH THIS NON-TORT ACTION AGAINST THE NYC DISTRICT ATTORNEY DID NOT TRIGGER THE NOTICE OF CLAIM REQUIREMENT OF THE GENERAL MUNICIPAL LAW, IT DID TRIGGER THE NOTICE OF CLAIM REQUIREMENT OF THE COUNTY LAW (FIRST DEPT).

Slemish Corp. S.A. v Morgenthau, 2021 NY Slip Op 01370, First Dept 3-9-21

Practice Point: The notice of claim requirement in the County Law, unlike its counterpart in the Municipal Law, applies to this non-tort action for money had and received against a county employee.

MUNICIPAL LAW, NOTICE OF CLAIM.

THE COURT LACKED AUTHORITY TO DEEM A NOTICE OF CLAIM TIMELY FILED MORE THAN ONE YEAR AND 90 DAYS AFTER THE CAUSE OF ACTION (SLIP AND FALL) ACCRUED, EVEN THOUGH THE SUMMONS AND COMPLAINT WAS SERVED WITHIN THAT TIME PERIOD; A NOTICE OF CLAIM FILED MORE THAN 90 DAYS AFTER THE CAUSE OF ACTION ACCRUES WITHOUT LEAVE OF COURT IS A NULLITY (FOURTH DEPT).

Bennett v City of Buffalo Parks & Recreation, 2021 NY Slip Op 01920, Fourth Dept 3-26-21

Practice Point: A notice of claim filed more than 90 days after the claim accrued without leave of court is a nullity. A court does not have the authority to grant leave to file a late notice of claim more than one year and 90 days after the claim accrued.

MUNICIPAL LAW.

THE NYPD IS A DEPARTMENT OF THE CITY AND CANNOT BE SEPARATELY SUED; THE 42 USC 1983 CIVIL RIGHTS VIOLATION CAUSE OF ACTION WAS NOT SUPPORTED BY SUFFICIENT ALLEGATIONS OF AN UNCONSTITUTIONAL CITY CUSTOM OR POLICY; THE OTHER CAUSES OF ACTION AGAINST THE CITY FALL BECAUSE THERE WAS PROBABLE CAUSE FOR PLAINTIFF'S ARREST AND THE FORCE USED BY THE POLICE WAS NOT EXCESSIVE UNDER THE CIRCUMSTANCES (SECOND DEPT).

Brown v City of New York, 2021 NY Slip Op 01743, Second Dept 3-24-21

Practice Point: In New York City the police department is not properly sued as an entity separate from the city. In other words, the city is the appropriate party for a suit against the police.

NECESSARY PARTIES, FORECLOSURE, DECEASED MORTGAGORS.

IN THIS FORECLOSURE ACTION, THE JUDGE SHOULD HAVE FIRST DETERMINED WHETHER ANY DISTRIBUTEES OF THE DECEASED MORTGAGORS WERE NECESSARY PARTIES [RPAPL 1311 (1)] AND, IF SO, SUMMON THEM PURSUANT TO CPLR 1001 [b]; THE MOTION TO DISMISS FOR FAILURE TO JOIN NECESSARY PARTIES SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

NRZ Pass-Through Trust IV v Tarantola, 2021 NY Slip Op 01423, Second Dept 3-10-21

Practice Point: If the court can exercise jurisdiction over a necessary party, the court should summon the party pursuant to CPLR 1001 (b) and should not dismiss the action for failure to name a necessary party.

NECESSARY PARTIES, FORECLOSURE.

THE ESTATE OF THE MORTGAGOR WAS NOT A NECESSARY PARTY IN THIS FORECLOSURE ACTION; THE PROPERTY WAS CONVEYED BEFORE HER DEATH AND THE COMPLAINT DOES NOT SEEK A DEFICIENCY JUDGMENT (SECOND DEPT).

[U.S. Bank N.A. v Apelbaum, 2021 NY Slip Op 02008, Second Dept 3-31-21](#)

Practice Point: If the property was transferred by the mortgagor prior to the mortgagor's death and the bank is not seeking a deficiency judgment against the estate, the mortgagor's estate is not a necessary party in a foreclosure action.

ORDERS, JUDGMENTS, DECISIONS.

WHERE THERE IS AN INCONSISTENCY BETWEEN AN ORDER OR A JUDGMENT AND THE DECISION UPON WHICH IT IS BASED, THE DECISION CONTROLS (FIRST DEPT).

[Schwartzbard v Cogan, 2021 NY Slip Op 01523, First Dept 3-16-21](#)

Practice Point: If there is a discrepancy between an order or a judgment and the related decision, the decision controls.

REFEREES, ORDER OF REFERENCE.

THE REFEREE DID NOT COMPLY WITH THE ORDER OF REFERENCE; SUPREME COURT'S RULINGS BASED UPON THE REFEREE'S ORDER WERE THEREFORE INVALID (SECOND DEPT).

Brighton Leasing Corp. v Brighton Realty Corp., 2021 NY Slip Op 01384 Second Dept 3-10-21

Practice Point: If a referee does not comply with the order of reference, the court cannot base its ultimate ruling on the referee's order.

SERVICE, AFFIDAVIT OF, WARRANT OF EVICTION.

THERE IS NO NEED TO FILE AN AFFIDAVIT OF SERVICE AFTER SERVICE OF A WARRANT AND NOTICE OF EVICTION; THE MATTER WAS CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (THIRD DEPT).

Matter of Dixon v County of Albany, 2021 NY Slip Op 01819, Third Dept 3-25-21

Practice Point: The failure to file an affidavit of service after service of a warrant and notice of eviction does not invalidate the warrant and notice.

STANDING.

THE BANK'S PROOF OF STANDING TO BRING THE FORECLOSURE ACTION WAS INSUFFICIENT (SECOND DEPT),

U.S. Bank, N.A. v Ainsley, 2021 NY Slip Op 02014, Second Dept 3-31-21

Practice Point: In this foreclosure, the bank was not able to demonstrate it had standing to foreclose with a note and allonge endorsed in blank because the allonge

was not affixed to the note in the manner required by the applicable version of UCC 3-202 (2).

STATUTE OF LIMITATION, FORECLOSURE, ACCELERATION OF THE DEBT.

THE DEFAULT LETTER, WHICH INDICATED THE MORTGAGE DEBT WOULD BE ACCELERATED AT A SPECIFIC FUTURE DATE IF THE DEFAULT WERE NOT CURED, DID NOT ACCELERATE THE DEBT; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START RUNNING AND THE FORECLOSURE ACTION WAS TIMELY (THIRD DEPT).

GMAT Legal Tit. Trust 2014-1, Us Bank Natl. Assn. v Wood, 2021 NY Slip Op 01455, Third Dept 3-11-21

Point Point: A letter notifying a borrower that the borrower is in default and that the mortgage debt will be accelerated at some point in the future if the arrears are not paid does not accelerate the debt, meaning that the letter does not trigger the statute of limitations for bringing a foreclosure action.

STATUTE OF LIMITATIONS, INFANCY TOLL.

THE INFANCY TOLL OF THE STATUTE OF LIMITATIONS IN CPLR 208 APPLIES TO A WRONGFUL DEATH ACTION WHERE THE SOLE DISTIBUTEES ARE INFANTS; THE TOLL, HOWEVER, DOES NOT APPLY TO A RELATED ASSAULT AND BATTERY ACTION WHICH IS PERSONAL TO THE DECEDENT (FRIST DEPT).

Machado v Gulf Oil, L.P., 2021 NY Slip Op 01849, First Dept 3-25-21

Practice Point: Where the father's death gives rise to a wrongful death action and the father's only distributees are children, the statute of limitations is tolled until a

guardian of the child's property is appointed or the child reaches the age of majority, whichever occurs first.

STATUTE OF LIMITATIONS, SIX-MONTH EXTENSION, CPLR 205 (a).

THE ORDER DISMISSING THE COMPLAINT FOR FAILURE TO SEEK A DEFAULT JUDGMENT WITHIN ONE YEAR DID NOT INCLUDE SPECIFIC FINDINGS OF A PATTERN OF DELAY; THEREFORE THE "FAILURE TO PROSECUTE" EXCEPTION IN CPLR 205 (A) DID NOT APPLY; PLAINTIFF'S ACTION BROUGHT WITHIN SIX MONTHS OF DISMISSAL WAS NOT TIME-BARRED (FIRST DEPT).

[U.S. Bank N.A. v Kim, 2021 NY Slip Op 01876, First Dept 3-25-21](#)

Practice Point: Where the plaintiff's action is dismissed for failure to take a default judgment within one year, and the order of dismissal does not make specific findings of a general pattern of delay on plaintiff's part, the plaintiff can take advantage of the six-month extension pursuant to CPLR 205 (a) and file a new action.

STATUTE OF LIMITATIONS, SIX-MONTH EXTENSION, CPLR 205 (a).

BECAUSE THE ORDER DISMISSING THE INITIAL COMPLAINT DID NOT SPECIFY CONDUCT CONSTITUTING NEGLIGENCE TO PROSECUTE, THE SIX-MONTH TOLL OF THE STATUTE OF LIMITATIONS PURSUANT TO CPLR 205 (a) APPLIED AND THE ACTION WAS TIMELY; THE DISSENT DISAGREED (SECOND DEPT).

[Deutsche Bank Natl. Trust Co. v Baquero, 2021 NY Slip Op 01246, Second Dept 3-3-21](#)

Practice Point: The CPLR 205 (a) six-month extension of time to file a new action after a dismissal of the initial action does not apply where the initial action was dismissed for failure to prosecute. An order dismissing a complaint for failure to prosecute must findings of specific conduct demonstrating a general pattern of delay.

In the absence of such specific findings, the CPLR 205 (a) six-month extension is available.

SUA SPONTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, AFTER A COMPLIANCE CONFERENCE, ISSUED A PRECLUSION ORDER BECAUSE THERE WAS NO MOTION PENDING (FIRST DEPT).

Sullivan v Snow, 2021 NY Slip Op 01873, First Dept 3-25-21

Practice Point: A judge cannot, sua sponte, order relief in the absence of a pending motion requesting that relief.

SUMMARY JUDGMENT, PREMATURE MOTION.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS PEDESTRIAN-VEHICLE ACCIDENT CASE WAS PREMATURE; PLAINTIFF HAD NOT YET BEEN DEPOSED (FIRST DEPT).

Bey v Rosado, 2021 NY Slip Op 01840, First Dept 3-25-21

Practice Point: In a traffic accident case, a motion for summary judgment brought by the plaintiff before the plaintiff has been deposed may be denied as premature, even though the plaintiff need not show the absence of comparative fault.

UNIFORM COMMERCIAL CODE, DEFECTIVE GOODS.

EVEN THOUGH PLAINTIFF MAY HAVE ACCEPTED DEFECTIVE GOODS WITHIN THE MEANING OF THE UCC, THE UCC PROVIDES REMEDIES, INCLUDING THE RIGHT TO BE MADE WHOLE AND THE RIGHT TO REVOKE THE ACCEPTANCE; PLAINTIFF'S VERDICT SHOULD NOT HAVE BEEN SET ASIDE (SECOND DEPT).

Campbell v Bradco Supply Co., 2021 NY Slip Op 01745, Second Dept 3-24-21

Practice Point: The Uniform Commercial Code provides relief to a party who has accepted defective goods. The party who accepted defective goods may, under the Code, be made whole and/or revoke the acceptance.

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