NEW YORK APPELLATE DIGEST, LLC

Weekly Newsletter
April 12 – 16, 2021

An Organized Compilation of the Summaries of Selected Decisions Released by Our New York State Appellate Courts the Week of April 12 – 16, 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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ARBITRATION.

THE CONTRACT WAS BETWEEN CORPORATIONS IN DIFFERENT STATES, THEREFORE INTERSTATE COMMERCE WAS IMPLICATED AND THE FEDERAL ARBITRATION ACT (FAA) APPLIED; THE CONTRACT PROPERLY PROVIDED THAT THE ARBIRTRATOR, NOT A COURT, WILL DECIDE GATEWAY ISSUES OF ARBITRABILITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the Federal Arbitration Act (FAA) applied to the contract between corporations from different states and the contract properly provided that gateway issues of arbitrability are to be decided by the arbitrator, not the court:

Where "a contract containing an arbitration provision 'affects' interstate commerce, disputes arising thereunder are subject to the FAA" … . The surety agency agreement here between corporations from different states gave rise to a finding of interstate commerce and was subject to the FAA … . Although "a New York court, applying the Federal Arbitration Act, limits its inquiry to whether there is a valid agreement to arbitrate the particular dispute" and all other questions are for the arbitrator … , the parties can agree to arbitrate gateway issues of arbitrability … .

Applying principles of New York state contract law, based on the choice of law provision governing the surety agency agreement … , and reading the contractual clauses together in context … , the provision that "[i]f a dispute or disagreement arises in connection with this Agreement, including a dispute or disagreement as to its formation or validity, such dispute or disagreement shall be submitted to arbitration," refers any disputes over the validity or formation of the arbitration provision in question to arbitration. Accordingly, the matter here should proceed to arbitration. Matter of Bergassi Group LLC v Allied World Ins. Co., 2021 NY Slip Op 02265, First Dept 4-13-21

BANKRUPTCY, CIVIL PROCEDURE, NEGLIGENCE.

PLAINTIFF BROUGHT A PERSONAL INJURY ACTION AFTER FILING FOR BANKRUPTCY AND BEFORE THE BANKRUPTCY ESTATE WAS FULLY ADMINISTERED BUT DID NOT DISCLOSE THE CAUSE OF ACTION IN THE BANKRUPTCY PROCEEDING; DEFENDANT WAS ENTITLED TO ASSERT THE JUDICIAL ESTOPPEL DEFENSE IN AN AMENDED ANSWER AND TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant in a personal injury action should have been allowed to amend its answer to assert judicial estoppel and should have been granted summary judgment on the ground the plaintiff did not disclose the cause of action in the bankruptcy proceeding:

On July 6, 2012, the plaintiff filed a chapter 13 bankruptcy petition … in the United States Bankruptcy Court for the District of New Jersey … . … On September 3, 2014, the plaintiff allegedly was injured due to the defendant's negligence. Thereafter, on July 2, 2015, the plaintiff commenced this action to recover damages for his injuries. … On December 4, 2017, a final decree was entered declaring the bankruptcy estate fully administered, and the bankruptcy case was closed. …

… [T]he plaintiff is judicially estopped from pursuing this action because he failed to disclose its existence to the bankruptcy court during the pendency of the chapter 13 bankruptcy proceeding … . The plaintiff had a continuing obligation to update his asset schedules throughout the pendency of the bankruptcy proceeding … . Flanders v E. W. Howell Co., LLC, 2021 NY Slip Op 02276, Second Dept 4-14-21

CIVIL PROCEDURE, CONTRACT LAW.

IN THIS RESIDENTIAL-MORTGAGE-BACKED-SECURITIES BREACH OF CONTRACT ACTION, THE LAW OF THE CASE DOCTRINE DID NOT PRECLUDE RAISING THE "BORROWING STATUTE" (STATUTE OF LIMITATIONS) DEFENSE IN AN AMENDED ANSWER SERVED AS OF RIGHT (WITHOUT LEAVE OF COURT); LAW OF THE CASE DOCTRINE EXPLAINED IN SOME DEPTH (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, reversing (modifying) Supreme Court, determined that the amended answer with counterclaims, alleging for the first time that the action was untimely under the borrowing statute (CPLR 202), was properly served "as of right" (without leave of court) and the inclusion of the borrowing statute defense was not barred by the law of the case doctrine (LOTC). The opinion includes an in-depth discussion of the LOTC. The opinion rejected the arguments that certain contract provisions were conditions precedent as opposed to independent contractual obligations and certain breach of contract claims were really claims for indemnification. All of the contracts stem from residential-mortgage-backed-securities and obligations to cover losses from the alleged breach of "representations and warranties" concerning the underlying mortgages. With regard to the LOTC, the court wrote:

The doctrine of LOTC is a rule of practice premised upon sound policy that once an issue is judicially determined, further litigation of that issue should be precluded in a particular case … . It ends the matter as far as judges and courts of coordinate jurisdiction are concerned … . While it shares some characteristics of a larger family of kindred concepts, including res judicata and collateral estoppel, it is not identical … . All these concepts contemplate that the party opposing preclusion had a full and fair opportunity to litigate the underlying determination. LOTC, however, differs in that it only addresses the potentially preclusive effect of judicial determinations made during a single litigation and before a final judgment is rendered … . In addition, while res judicata and collateral estoppel are "rigid rules of limitation," LOTC has been described as "amorphous" and involving "an element of discretion" … . Discretion, however, is circumscribed where the decision providing the basis for LOTC is by an appellate court. Thus, while LOTC cannot bind an appellate court to a trial court ruling … , it does bind a trial court (and subsequent appellate courts

of coordinate jurisdiction) to follow the mandate of an appellate court, absent new evidence or a change in the law … . Matter of Part 60 RMBS Put – Back Litig., 2021 NY Slip Op 02252, First Dept 4-13-21

CIVIL PROCEDURE, EVIDENCE.

A THEORY ASSERTED FOR THE FIRST TIME IN OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION, AFTER DISCOVERY HAD ENDED, SHOULD NOT HAVE BEEN CONSIDERED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this breach of contract action should have been granted. Plaintiff raised a new theory in opposition to the motion, after discovery had ended:

Plaintiff Frank Darabont, represented by his agent, plaintiff Creative Arts Associates, entered into an agreement to develop and run the television series The Walking Dead in exchange for fixed payments for each episode of the series, as well as backend compensation contingent upon the show's profitability, as calculated based on "Modified Adjusted Gross Receipts" (MAGR), with defendant AMC Network Entertainment LLC producing the series and exhibiting it on its own cable channel.

Plaintiffs' claim that AMC breached the implied covenant of good faith and fair dealing by crafting the formula for MAGR arbitrarily, irrationally, or in bad faith was improperly asserted for the first time in opposition to defendants' motion for summary judgment … . … [T]here are no allegations in the complaint that AMC engaged in misconduct by formulating the MAGR definition in such a manner as to deprive plaintiffs of contractual benefits. … [I]t would be prejudicial to require AMC to defend against a theory of liability asserted only after discovery had concluded. Darabont v AMC Network Entertainment LLC, 2021 NY Slip Op 02240, First Dept 4-13-21

CRIMINAL LAW.

CONSECUTIVE SENTENCES FOR CRIMINAL SALE OF A CONTROLLED SUBSTANCE AND CONSPIRACY WERE PROPER, CRITERIA EXPLAINED IN SOME DEPTH (SECOND DEPT).

The Second Department determined defendant was properly given consecutive sentences for criminal sale of a controlled substance and conspiracy:

Penal Law § 70.25(2) provides: "When more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences . . . must run concurrently" … .

"[T]he commission of one offense is a material element of a second for restrictive sentencing purposes if, by comparative examination, the statutory definition of the second crime provides that the first crime is also a necessary component in the legislative classification and definitional sense" … . Conspiracy in the second degree has two elements, (1) an agreement with one or more persons to engage in or cause the performance of conduct constituting a class A felony … , and (2) "an overt act . . . committed by one of the conspirators in furtherance of the conspiracy" … . While criminal sale of a controlled substance in the second degree is a Class A-II felony … , it is one of many Class A felonies contained in the Penal Law, and conspiracy in the second degree requires only the agreement to engage in conduct constituting a Class A felony, not the commission of such conduct. Furthermore, while "[t]he overt act must be an independent act that tends to carry out the conspiracy, [it] need not necessarily be the object of the crime" … . Thus, criminal sale of a controlled substance in the second degree … is not a material element of conspiracy in the second degree … .

Moreover, the acts underlying the crimes committed by the defendant were separate and distinct … . Crimes are separate when commission of one crime is complete at the time that the intent is formed to commit the second crime, even if the first crime is an element of the second crime … . The fundamental question is not whether the same criminal intent inspired the whole transaction, but whether separate acts have

been committed with the requisite criminal intent … . People v Blue, 2021 NY Slip Op 02305, Second Dept 4-14-21

CRIMINAL LAW.

THE ANONYMOUS TIP THAT A MAN WITH A GUN WAS LEAVING A CLUB DID NOT PROVIDE THE POLICE WITH SUFFICIENT INFORMATION FOR STOPPING AND DETAINING THE DEFENDANT WHO SUBSEQUENTLY RAN, PULLED OUT A HANDGUN AND WAS SHOT BY THE POLICE; DEFENDANT'S MOTION TO SUPPRESS THE HANDGUN SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing the denial of defendant's suppression motion, determined the police, action on an anonymous tip, did not have sufficient information to stop and detain the defendant. The defendant ran, pulled out a handgun, and was shot by the police. The defendant moved to suppress the handgun. The Second Department noted that the theories supporting the initial stop of the defendant where not raised or ruled upon below and therefore could not be considered on appeal:

… [T]he Supreme Court erred in finding, in effect, that the police had lawfully stopped the defendant before the defendant fled from the police and removed a gun from his waist. The hearing testimony indicated that the law enforcement officials who were in the sergeant's vehicle had received a tip that two individuals, one of whom had a gun, were leaving the club. There was no evidence presented at the hearing as to the identity of the individual who provided the tip, no evidence that the informant explained to the police how he or she knew about the gun, no evidence that the informant supplied any basis to believe that he or she had inside information about the defendant, and no evidence that the informant had "'knowledge of concealed criminal activity'" … . Therefore, the police lacked reasonable suspicion to stop the defendant and his companion based solely on the tip. People v Benbow, 2021 NY Slip Op 02304, Second Dept 4-14-21

CRIMINAL LAW.

THE EVIDENCE THAT DEFENDANT WAS AN ACCOMPLICE IN A DRUG SALE AND WAS PART OF A CONSPIRACY TO SELL DRUGS WAS LEGALLY INSUFFICIENT; MERE PRESENCE IS NOT ENOUGH FOR ACCOMPLICE LIABILITY AND THERE WAS NO PROOF OF AN OVERT ACT RELEVANT TO DEFENDANT (SECOND DEPT).

The Second Department, reversing defendant's convictions of criminal sale of a controlled substance, on an accomplice theory, and conspiracy, based on mere presence. Defendant was in the car with Alvarado, who sold heroin to an undercover officer who briefly got into the car, purchased the drugs, and left. The evidence defendant acted as an accomplice and was part of a conspiracy was deemed legally insufficient and against the weight of the evidence:

… [T]he evidence reflects that the defendant met Alvarado on April 25, 2015, to accompany Alvarado to the driving school before Alvarado and the undercover officer arranged the meeting, and that Alvarado told the undercover officer prior to the meeting that he had to "do this thing for my license." Thus, the defendant's mere presence during the sale, with knowledge of what was transpiring at that time, was insufficient to establish the defendant's guilt of criminal sale of a controlled substance in the third degree … . …

… [T]he evidence was legally insufficient to establish that the defendant entered into an agreement with Alvarado to sell heroin on April 25, 2015, since there was no evidence that the defendant participated in arranging the heroin sale or even had any discussion with Alvarado about selling heroin on that date … . Further, the People failed to present any evidence of an "overt act" connected to any statements made during the wiretapped calls between the defendant and Alvarado. Accordingly, the evidence was legally insufficient to establish the defendant's guilt of conspiracy in the fourth degree beyond a reasonable doubt. People v Moreno, 2021 NY Slip Op 02316, Second Dept 4-14-21

EDUCATION-SCHOOL LAW, NEGLIGENCE.

THE ASSAULT ON PLAINTIFF STUDENT BY ANOTHER STUDENT HAPPENED IN SO SHORT A TIME IT COULD NOT HAVE BEEN PREVENTED BY SCHOOL PERSONNEL; THE SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant school district's motion for summary judgment should have been granted in this student on student third-party assault case:

… [T]he infant plaintiff, who was then a fourth-grade elementary school student, was standing outside with his friends during a lunch recess when a fellow student ran up to him from behind and pushed him, causing him to fall. …

… [T]he defendant established its entitlement to judgment as a matter of law by demonstrating, prima facie, that its alleged negligence in supervising the infant plaintiff was not a proximate cause of the infant plaintiff's injuries … . The incident occurred in such a short span of time that the most intense supervision could not have prevented it. I.S. v Hempstead Union Free Sch. Dist., 2021 NY Slip Op 02329, Second Dept 4-14-21

EMPLOYMENT LAW, NEGLIGENCE.

THE PROPERTY OWNER WAS NOT LIABLE FOR THE ACTIONS OF THE INDEPENDENT CONTRACTOR; PLAINTIFF TRIPPED OVER THE HOSE USED BY THE CONTRACTOR TO DELIVER OIL (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant property owner, Goldner, was not liable for the actions of defendant independent contractor, UMEC, because Goldner did not oversee UMEC's work and, based upon the protective measures taken by UMEC in the past, the incident was not foreseeable. UMEC delivered oil to Goldner and plaintiff allegedly tripped over the hose which

ran across the sidewalk. In the past UMEC had set up safety measures to protect pedestrians from the tripping hazard:

"Generally, a party that hires an independent contractor cannot be held liable for the negligence of that independent contractor" … . "The primary justification for this rule is that one who employs an independent contractor has no right to control the manner in which the work is to be done and thus, the risk of loss is more sensibly placed on the contractor" … . There are various exceptions to this general rule, including "(1) [n]egligence of the employer in selecting, instructing, or supervising the contractor"; (2) "[n]on-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff"; and (3) "[w]ork which is specially, peculiarly, or inherently dangerous" … .

Under the circumstances presented, we disagree with the motion court's finding that triable issues of fact exist as to whether Goldner may be liable for the work of an independent contractor where danger is readily foreseeable. The deposition testimony shows that Goldner did not supervise, monitor, or control UMEC when the oil would be delivered. The evidence also shows that UMEC had a prior history of consistently placing safety measures to prevent a pedestrian from tripping over the oil hose. In light of the preexisting precautions established by UMEC and lack of any complaints from prior oil deliveries, Goldner was not placed on notice of the existence of a dangerous condition … . Here, the danger arose "because of the negligence of the independent contractor or [its] employees, which negligence [was] collateral to the work and which [was] not reasonably to be expected" … . Linder v United Metro Energy Servs. Corp., 2021 NY Slip Op 02250, First Dept 4-13-21

EVIDENCE.

THE BEST EVIDENCE RULE AND THE DEAD MAN'S STATUTE PRECLUDED PLAINTIFF FROM PROVING HIS CASE, WHICH WAS BASED UPON A CONTRACT AND DECEDENT'S STATEMENTS ABOUT THE CONTRACT; ALTHOUGH THE DEAD MAN'S STATUTE USUALLY WILL NOT PRECLUDE EVIDENCE AT THE SUMMARY JUDGMENT STAGE, HERE IT IS CLEAR PLAINTIFF WILL NOT BE ABLE TO PROVE HIS CASE AT TRIAL (SECOND DEPT).

The Second Department determined defendants' motion for summary judgment in this action based upon a contract between plaintiff and decedent was properly granted. The alleged copy of the contract was inadmissible pursuant to the best evidence rule, and any testimony about what the decedent said about the contract was prohibited by the Dead Man's statute:

… [T]he plaintiff failed to adequately explain the unavailability of the original executed joint development agreement … . Moreover, even if the plaintiff met his threshold burden of explaining the unavailability of the original joint development agreement, he failed to establish that the copy was a reliable and accurate portrayal of the original … . The plaintiff's proffered testimony that the copy was an exact copy of the original joint development agreement could not be offered at trial, as it was precluded by the application of the Dead Man's Statute (see CPLR 4519 …). …

"New York's Dead Man's Statute by its terms makes testimony by an interested witness 'concerning a personal transaction or communication between the witness and the deceased' excludable only '[u]pon the trial of an action or the hearing upon the merits of a special proceeding'" … .Generally, "[e]vidence, otherwise relevant and competent upon a trial or hearing, but subject to exclusion on objection under the Dead Man's Statute, should not predetermine the result on summary judgment in anticipation of the objection"… . Thus, evidence excludable at trial under CPLR 4519 may be considered in opposition to a motion for summary judgment … . However, a trial is unnecessary if it is certain that there would be no waiver of the statute and that all of the proof would be excludable … . Where, as here, the sole evidence proffered by the opposing party is barred by the Dead Man's Statute, an award of summary judgment is appropriate … . Stathis v Estate of Donald Karas, 2021 NY Slip Op 02330, Second Dept 4-14-21

FAMILY LAW, CONTRACT LAW.

PLAINTIFF IN THIS DIVORCE ACTION WAS ENTITLED TO A NEW HEARING ON WHETHER THE PRENUPTIAL AGREEMENT SHOULD BE SET ASIDE; THE COURT NOTED THAT A CONTRACT WHICH MAY NOT BE UNCONSCIONABLE WHEN ENTERED MAY BECOME UNCONSCIONABLE WHEN FINAL JUDGMENT IS ENTERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to a new hearing on whether the prenuptial agreement was unconscionable. In the agreement, each party waived maintenance, equitable distribution and attorney's fees. At the time the agreement was entered plaintiff was making $75 to $80,000 per year. At the time of the divorce plaintiff alleged she had no assets and needed public assistance:

"An agreement between spouses or prospective spouses should be closely scrutinized, and may be set aside upon a showing that it is unconscionable, or the result of fraud, or where it is shown to be manifestly unfair to one spouse because of overreaching on the part of the other spouse"… . "An agreement that might not have been unconscionable when entered into may become unconscionable at the time a final judgment would be entered" … .

Here, the plaintiff submitted evidence with her motion papers in support of her argument that the prenuptial agreement should be set aside as a matter of public policy since, at the time of her motion, she was unemployed, had become reliant on public assistance for herself and her children, and had no financial resources … . Despite the plaintiff having raised this argument, the Supreme Court failed to address the plaintiff's contention that the enforcement of the agreement would result in the risk of her becoming a public charge … . Mahadeo v Mahadeo, 2021 NY Slip Op 02285, Second Dept 4-14-21

FAMILY LAW, CONTRACT LAW.

THE CHILDREN DO NOT HAVE STANDING TO PARTICIPATE IN LITIGATION REGARDING THEIR PARENTS' PRENUPTIAL AGREEMENT; THEREFORE THE ATTORNEY FOR THE CHILD DID NOT HAVE THE AUTHORITY TO MAKE A MOTION CONCERNING THE PRENUPTIAL AGREEMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the children did not have standing to participate in the litigation of financial matters of their parents' divorce, including the litigation concerning whether the prenuptial agreement should be set aside. Therefore the attorney for the child (AFC) did not have the authority to make a motion regarding the prenuptial agreement:

Although children have certain rights with respect to issues of child support, custody, and visitation in matrimonial actions … , children do not have a right to participate in the litigation of financial matters of their parents' divorce relating to maintenance and/or equitable distribution.

Moreover, while "children's attorneys are expected to participate fully in proceedings in which they are appointed" … , such participation is limited to matters in which the children are the "subject of the proceeding" (Family Court Act § 249; see Judiciary Law § 35[7]). Given that children are not bound by agreements entered into by their parents , they are not the "subject" of proceedings to determine the validity of their parents' prenuptial agreement related to maintenance and equitable distribution (Family Court Act § 249). Mahadeo v Mahadeo, 2021 NY Slip Op 02286, Second Dept 4-14-21

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE APPOINTED PETITIONER GUARDIAN OF THE CHILD AND SHOULD HAVE MADE THE FINDINGS NECESSARY TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SECOND DEPT).

The Second Department, reversing Family Court, determined petitioner should have been appointed guardian of the child and Family Court should have made the findings necessary for the child to petition for Special Immigrant Juvenile Status (SIJS):

Upon our independent factual review of the record, we find that the subject child's best interests would be served by the appointment of the petitioner as his guardian … . …

… [T]he subject child is under the age of 21 and unmarried, and since we have appointed the petitioner as the subject child's guardian, the subject child is dependent on a juvenile court within the meaning of 8 USC § 1101(a)(27)(J)(i) … . Further, based upon our independent factual review, the record supports a finding that reunification of the subject child with his father is not a viable option due to parental abandonment … . Lastly, the record reflects that it would not be in the subject child's best interests to be returned to El Salvador, his previous country of nationality or country of last habitual residence … . Matter of Jose E. S. G., 2021 NY Slip Op 02294, Second Dept 4-14-21

FAMILY LAW.

THE EVIDENCE THAT THE PATERNAL UNCLE STRUCK THE CHILD ON THE ARM AFTER SHE MADE FUN OF AN ADULT IN THE HOUSEHOLD WAS NOT SUFFICIENT TO SUPPORT THE NEGLECT AND DERIVATIVE NEGLECT FINDINGS (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence the child's paternal uncle struck the child on the arm after the child had made fun of

another adult in the household did not support a neglect and derivative neglect finding. (The paternal uncle denied striking the child):

While those legally responsible for the care of children "have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare" … , the use of excessive corporal punishment constitutes neglect … . The petitioner has the burden of proving neglect by a preponderance of the evidence … . Although a single incident of excessive corporal punishment may suffice to support a finding of neglect in a given case, there are instances where the record will not support such a finding, even where the use of physical force was inappropriate … . Under the circumstances presented here, we agree with the paternal uncle and the attorneys for the respective children that the Family Court erroneously found that ACS [Administration for Children's Services] established by a preponderance of the evidence that the paternal uncle neglected Myiasha by inflicting excessive corporal punishment upon her. ACS failed to establish that the paternal uncle's action in inappropriately striking the child rose to the level of neglect, or that he intended to hurt Myiasha, or exhibited a pattern of excessive corporal punishment … . Moreover, there was insufficient evidence that Myiasha suffered the requisite impairment of her physical, mental, or emotional well-being to support a finding of neglect … . Matter of Myiasha K. D. (Marcus R.), 2021 NY Slip Op 02290, Second Dept 4-14-21

FORECLOSURE.

A PROPER FOUNDATION FOR THE BUSINESS RECORDS NECESSARY TO DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION WAS NOT LAID; THE BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not law a proper foundation for the business records required to demonstrate standing to bring the foreclosure action:

… [T]he plaintiff submitted … the affidavit of Kathleen Manly, an assistant vice present of Residential Credit Solutions, Inc. … , the plaintiff's loan servicer. While

Manly averred … that she was familiar with Residential's records and record-keeping practices, and that she had reviewed the records of the prior loan servicer, Bank of America, N.A. … , she did not state that she was familiar with the records or record-keeping practices of Bank of America or that Bank of America's records were incorporated into Residential's records and routinely relied upon by Residential in its own business. Thus, she failed to lay a foundation for the admissibility of the records she relied upon to support her claim that the plaintiff possessed the original note prior to the commencement of this action … . Bank of N.Y. Mellon v Penso, 2021 NY Slip Op 02268, Second Dept 4-14-21

FORECLOSURE.

PLAINTIFF BANK DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION; THE REQUIRED BUSINESS RECORDS WERE NOT SUBMITTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank failed to demonstrate standing to bring the foreclosure action with admissible evidence:

Although the plaintiff can establish standing by attaching the blank-endorsed note to the complaint when commencing the action … here, the record demonstrates that the plaintiff only attached the mortgage to the complaint. Moreover, although Wallace [representing the plaintiff bank's loan servicer] stated in her affidavit, based on her review of certain business records, that the plaintiff or its agent had possession of the note prior to commencement, the affidavit was insufficient to establish standing because the records themselves were not submitted by the plaintiff … . Deutsche Bank Natl. Trust Co. v Szal, 2021 NY Slip Op 02274, Second Dept 4-14-21

FORECLOSURE.

THE INSTANT FORECLOSURE ACTION WAS PRECLUDED BY A PRIOR FORECLOSURE ACTION WHICH HAD NOT BEEN DISCONTINUED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the instant foreclosure action was precluded by a prior action which had not been discontinued:

In May 2014, JPMorgan commenced an action to foreclose the consolidated mortgage (hereinafter the prior action). In August 2014, JPMorgan assigned the consolidated mortgage to Bayview Loan Servicing, LLC (hereinafter the plaintiff). In August 2016, the plaintiff commenced this action to foreclose the subject mortgage. …

RPAPL 1301(3) provides that "[w]hile [an] action is pending . . . , no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." "The object of the statute is to shield the mortgagor from the expense and annoyance of two independent actions at the same time with reference to the same debt" … . Here, since the plaintiff commenced the instant action without leave of the court in which the prior action was brought, and there is no basis in the record to determine that JPMorgan discontinued or effectively abandoned the prior action, dismissal is warranted under RPAPL 1301(3) … . Bayview Loan Servicing, LLC v Starr-Klein, 2021 NY Slip Op 02269, Second Dept 4-14-21

FORECLOSURE.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION WAS BASED UPON INADMISSIBLE HEARSAY AND SHOULD NOT HAVE BEEN CONFIRMED BY SUPREME COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed because the report was based upon inadmissible hearsay:

"The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" … . Here, the affidavit of an employee of the plaintiff's loan servicer, submitted for the purpose of establishing the amount due and owing under the subject mortgage loan, constituted inadmissible hearsay and lacked probative value because the affiant did not produce any of the business records she purportedly relied upon in making her calculations … . Under the circumstances, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record … . Bank of N.Y. Mellon v Davis, 2021 NY Slip Op 02267, Second Dept 4-14-21

INSURANCE LAW.

THE MEDICAL CENTER WAS ENTITLED TO THE NO-FAULT INSURANCE BENEFITS ASSIGNED TO IT BY THE PEDESTRIAN INJURED BY PLAINTIFF'S TAXI; THE FACT THAT THE PEDESTRIAN HAD SETTLED HIS ACTION AGAINST THE PLAINTIFF TAXI COMPANY DID NOT HAVE ANY BEARING ON THE PLAINTIFF'S OBLIGATION TO PAY THE NO-FAULT BENEFITS TO THE MEDICAL CENTER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant medical center was entitled to the no-fault benefits assigned to it by the pedestrian injured by plaintiff's taxi in this traffic accident case. The fact that the pedestrian had settled his action against the plaintiff taxi company had no bearing on the assignment of the no-fault benefits to the medical center:

"[A]n account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee " … . To establish that it did not receive notice of the assignment, the plaintiff relies solely on an affidavit of an employee of the plaintiff's claims administrator, who asserted that the claims administrator never received the faxed notice on July 11, 2011. The employee's assertion, however, was belied by overwhelming documentary evidence. Indeed, a denial of claim form dated July 20, 2011, which was prepared by the plaintiff's claims administrator and

attached to the employee's affidavit, designated the defendant as the assignee. In addition, the defendant submitted an arbitration decision dated January 3, 2012, in which [the pedestrian's] arbitration claim against the plaintiff for no-fault benefits was dismissed on the ground that he lacked standing because he assigned the claims for no-fault benefits. Under these circumstances, the plaintiff failed to raise a triable issue of fact as to whether it received notice of the assignment. Murzik Taxi, Inc. v Lutheran Med. Ctr., 2021 NY Slip Op 02302, Second Dept 4-14-21

LANDLORD-TENANT, NEGLIGENCE.

REJECTING THE 2ND DEPARTMENT'S CRITICISM OF THE 1ST DEPARTMENT'S THIRD-PARTY-ASSAULT JURISPRUDENCE, THE 1ST DEPARTMENT HELD THE BROKEN DOOR THROUGH WHICH THE ASSAILANTS GAINED ACCESS TO THE BUILDING WHERE PLAINTIFF'S DECEDENT WAS SHOT AND KILLED WAS NOT A PROXIMATE CAUSE OF THE SHOOTING BECAUSE THE ASSAILANTS WOULD HAVE FOUND A WAY TO ENTER THE BUILDING EVEN IF THE DOOR LOCK WERE WORKING (FIRST DEPT).

The First Department determined the landlord, New York City Housing Authority (NYCHA), was not liable for the shooting death of plaintiff's decedent, Murphy, despite conclusive video evidence the locking mechanism on the door the assailants used to enter plaintiff's decedent's building was broken. Disagreeing with the Second Department's characterization of the First Department's jurisprudence in similar third-party assault cases, the First Department held that the assailants were intent on shooting plaintiff's decedent and would have gained entrance to the building even if the locking mechanism worked. Therefore the assailants' actions constituted the sole proximate cause of plaintiff's decedent's death:

We disagree with the [Second Department's] implication that under this Court's jurisprudence the fact that a victim was targeted obviates the need for any inquiry into the security measures in place at the subject premises. Indeed, we are aware of no case in the First Department that suggests that a landowner would avoid liability even if minimal precautions would have actually prevented a determined assailant from gaining access. In reality, however, that is hardly ever the case. In Buckeridge

v Broadie (5 AD3d 298, 300), … the assailants were "sophisticated" and disguised themselves to gain entry. In Cerda v 2962 Decatur Ave. Owners Corp. (306 AD2d 169, 170 [1st Dept 2003]) … the plaintiff was assaulted by a "team of assassins." … [C]ases confirm that this Court has not abandoned the notion that more than the simple fact that a victim was targeted is necessary to shield a property owner from liability. … [T]he cases confirm that, given the minimal steps a landowner is required to take to secure premises, it has no duty to outwit or outthink those who are determined to overcome those steps.

The record establishes that Murphy's killers were intent on gaining access to the building. … [C]onsidering that at least one other person, by all appearances oblivious to the brouhaha … , entered the building at the same time, it does not take a leap of the imagination to surmise that [the assailants] would have gained access to the building by following another person in or forcing such a person to let them in. This negates the unlocked door as a proximate cause of the harm that befell Murphy, and makes her assailants' murderous intent the only proximate cause. Estate of Murphy v New York City Hous. Auth., 2021 NY Slip Op 02246, First Dept 4-13-21

MUNICIPAL LAW, NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE POLICE OFFICER WHO COLLIDED WITH HER CAR WAS ENGAGED IN AN EMERGENCY OPERATION AT THE TIME OF THE ACCIDENT; THEREFORE THE ORDINARY NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff had raised a question of fact whether defendant police officer, Breen, was in fact involved in an emergency operation at the time she collided with the car in which plaintiff was a passenger. Therefore there was a question of fact whether the ordinary negligence principles, as opposed the reckless disregard standard, applied:

"[T]he reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency

operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence" … .

Here, the defendants established, prima facie, that a negligence standard of care was inapplicable to Breen's conduct, through the submission of evidence establishing that Breen was responding to another officer in need of assistance when she entered the intersection against a red traffic light and collided with the plaintiff's vehicle … . In opposition, however, the plaintiff raised triable issues of fact as to whether Breen was in fact responding to the other officer's call at the time of the accident and, therefore, whether the negligence standard should apply … . Modica v City of New York, 2021 NY Slip Op 02287, Second Dept 4-14-21

MUNICIPAL LAW, NEGLIGENCE.

THE POLICE OFFICERS' DECIDING NOT TO ARREST PLAINTIFF'S DECEDENT'S SON AFTER AN ALTERCATION BETWEEN HER AND HER SON WAS AN EXERCISE OF DISCRETION PROTECTED BY GOVERNMENTAL IMMUNITY; THEREFORE THE CITY WAS NOT LIABLE FOR THE SUBSEQUENT ATTACK BY HER SON RESULTING IN THE DEATH OF PLAINTIFF'S DECEDENT (SECOND DEPT).

The Second Department, reversing Supreme Court in this third-party assault case, determined the city could not be held liable for the injury and death of plaintiff's decedent at the hands of her son. The police had been called to plaintiff's decedent's home because of an altercation between her and her son, Matthew. The police did not arrest her son. The next day her son attacked her with a baseball bat and she died from her injuries. The Second Department held that the decision not to arrest the son was an exercise of discretion which is protected by the doctrine of governmental immunity:

The governmental function immunity defense cannot attach unless the municipal defendant establishes that the discretion possessed by its employees was in fact exercised in relation to the conduct on which liability is predicated … . The immunity afforded a municipality presupposes an exercise of discretion in

compliance with its own procedures … . The basis for the value judgment supporting immunity and denying individual recovery for injury becomes irrelevant where the municipality violates its own internal rules and policies and exercises no judgment or discretion … . Immunity is not available unless the municipality establishes that the action taken actually resulted from discretionary decision-making, meaning the exercise of reasoned judgment which could typically produce different acceptable results … .

Here, the defendants established … that the City was entitled to judgment as a matter of law … by its submissions, which demonstrated that the police officers' actions were discretionary, and they did not fail to follow the police department's rules and policies in deciding not to arrest Matthew … . The evidence demonstrated that the officers determined that Matthew had committed a violation during the altercation with his mother. Since the officers determined that no crime had been committed, pursuant to CPL 140.10(4)(c) and the patrol guide mandates, the officers were not compelled to arrest Matthew. The evidence further demonstrated that the officers' decision involved reasoned judgment and an exercise of discretion in compliance with departmental procedures. Devlin v City of New York, 2021 NY Slip Op 02275, Second Dept 4-14-21

NEGLIGENCE, EVIDENCE.

CONFLICTING EVIDENCE ABOUT WHETHER THERE WAS VIDEO SURVEILLANCE OF THE AREA WERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL PRECLUDED SUMMARY JUDGMENT (FIRST DEPT).

The First Department determined defendants' motion for summary judgment in this slip and fall case was properly denied. The incident report indicated there was video surveillance of the area where plaintiff allegedly slipped and fell on blueberries on the supermarket (Bogopa's) floor. An employee of defendant testified he did not know of any surveillance cameras in the supermarket:

The Bogopa defendants moved for summary judgment to dismiss the complaint. In support of their motion, the Bogopa defendants submitted, among other things, a

store incident report which checked a "yes" box when asked if the incident was captured on video, which should be preserved. * * *

The record presents contradictory statements from the Bogopa defendants regarding whether surveillance videos recording the time and location of plaintiff's fall were available and should have been preserved pursuant to an express video-preservation directive in the incident report prepared by the Bogopa defendants following plaintiff's accident. While the incident report mentions a surveillance recording, the Bogopa defendant's employee testified that he did not "know of" any surveillance cameras in the supermarket.

The Bogopa defendants argue in their motion for summary judgment that there is no evidence that establishes the existence of surveillance cameras in the supermarket. We disagree. Where, as here, potential video evidence existed of the alleged hazardous location that may have been of assistance to plaintiff in establishing whether defendants created and/or had notice of an alleged slippery, blueberry-strewn floor hazard, the motion by the Bogopa defendants for summary judgment dismissing the complaint against them should be denied. Banks v Bogopa, Inc., 2021 NY Slip Op 02236, Frist Dept 4-13-21

REAL PROPERTY LAW, MUNICIPAL LAW.

THE PLAINTIFFS WERE ENTITLED TO A DECLARATORY JUDGMENT TO THE EFFECT THE VILLAGE WAS REQUIRED TO REPAIR A BULKHEAD/STORM DRAIN WHICH RAN THROUGH AN EASEMENT ON PLAINTIFFS' PROPERTY; THE WOODEN BULKHEAD WHICH CRADLED THE DRAIN PIPE HAD DETERIORATED CAUSING SINK HOLES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiffs were entitled to a declaratory judgment to the effect that the village was required to repair the bulkhead/storm drain pipe that ran through plaintiffs' property pursuant to an easement. The drain pipe was encased in a wooden bulkhead which had deteriorated, causing sink holes on plaintiffs' property. The village had refused to repair the bulkhead, claiming it was responsible only for maintenance of the drain pipe:

In 1961, the plaintiffs' predecessors, who were the parents of the plaintiff June Anson, granted the Village a perpetual easement over a portion of their property, approximately 65 feet long and 10 feet wide, "to construct and maintain one underground storm water drain and one tide gate accessory thereto." In the easement agreement, the Village was also granted the right and privilege "to do whatever acts [we]re necessary and proper" in the easement premises for maintaining and operating the storm water drain and tide gate. The easement agreement did not assign any responsibility for maintenance of the easement premises to the property owners.
* * *

The plaintiffs' evidence demonstrated, prima facie, that the bulkhead was an integral part of the storm water drainage system currently maintained by the Village on the easement premises. Inasmuch as the easement agreement did not place affirmative responsibility for maintenance of those premises upon the owners of the servient estate, it was the Village's obligation to maintain the bulkhead … . … [T]he plaintiffs were entitled to a judgment declaring that the Village is required to maintain the easement premises, including the bulkhead, in a proper and safe condition, and an injunction requiring the Village to do so. Anson v Incorporated Vil. of Freeport, 2021 NY Slip Op 02266, Second Dept 4-14-21