NEW YORK APPELLATE DIGEST, LLC

Weekly Newsletter
April 5 – 9, 2021

An Organized Compilation of the Summaries of Selected Decisions Released by Our New York State Appellate Courts the Week of April 5 – 9, 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 to Return There. If You Click on the Citation to Go to a Decision, Use the "Right Click" to Avoid Losing Your Place in the Newsletter.

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ARBITRATION, ATTORNEYS.

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The Frist Department, reversing Supreme Court, determined the retainer agreement which required arbitration of any attorney's-fee dispute, which was entwined in the plaintiff's malpractice action against the attorneys, required that both the arbitrable fee dispute and the nonarbitrable malpractice action be addressed in the arbitration:

There is no dispute that there is a valid agreement between the parties to arbitrate any dispute regarding unpaid fees. Thus, the court must compel arbitration of defendants' claim for unpaid fees and stay this action pending completion of the arbitration (CPLR 7503[a]). Moreover, because plaintiff's nonarbitrable malpractice claim is inextricably intertwined with the arbitrable claim for unpaid fees, the proper course is to stay the action pending completion of the arbitration … . …

To the extent plaintiff argues that it cannot be forced to arbitrate its malpractice claim because it did not explicitly agree to do so, both the First and Second Departments have clearly found that a nonarbitrable issue can be decided in an arbitration when it is inextricably intertwined with an arbitrable issue, particularly where, as here, the determination of the arbitrable unpaid fees claim may dispose of the nonarbitrable malpractice claim … . Protostorm, Inc. v Foley & Lardner LLP, 2021 NY Slip Op 02227, First Dept 4-8-21

CONTRACT LAW, FIDUCIARY DUTY, ATTORNEYS.

THE COMPLAINT BY THE CONDOMINIUM BOARD OF MANAGERS AGAINST THE CONDOMINIUM MANAGING AGENT STATED DISTINCT CAUSES OF ACTION FOR BOTH BREACH OF FIDUCIARY DUTY AND BREACH OF CONTRACT; THE LAW FIRM WHICH REPRESENTED THE MANAGING AGENT IN AN UNRELATED MATTER INVOLVING THE CONDOMINIUM SHOULD NOT HAVE BEEN DISQUALIFIED (SECOND DEPT).

The Second Department, reversing Supreme Court in this dispute between the board of managers of Brightwater Condominium and the condominium managing agent, FirstService, determined the complaint stated causes of action for both breach of fiduciary duty and breach of contract, and the law firm (Woods) which represented FirstService in another matter with only a tangential relationship with Brightwater should not have been disqualified:

Managing agents of a condominium may owe a fiduciary duty to the condominium, depending on the functions they assume … . A fiduciary, in the context of condominium management, "is one who transacts business, or who handles money or property, which is not [its] own or for [its] own benefit, but for the benefit of another person, as to whom [it] stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part" … . …

Although a cause of action alleging breach of fiduciary duty which is based on the same facts and seeks identical damages is duplicative of a breach of contract cause of action and should be dismissed on that basis … , here, in addition to breaches of the management agreement, Brightwater alleges specific breaches of trust which are outside the duties set forth in the management agreement, such as misappropriation of funds, and instances of self-dealing, set forth with specificity. …

FirstService did not dispute Brightwater's showing that no confidential information was obtained from FirstService by the Woods Firm in connection with that prior action. As there is no indication in the record that confidential information was

disclosed, there is no basis for disqualification … . Board of Mgrs. of Brightwater Towers Condominium v FirstService Residential N.Y., Inc., 2021 NY Slip Op 02128, Second Dept 4-7-21

CONTRACT LAW, FIDUCIARY DUTY, CONSTRUCTIVE TRUST.

QUESTIONS OF FACT ABOUT WHETHER PART PERFORMANCE DEFEATED THE STATUTE OF FRAUDS DEFENSE TO THE ALLEGED ORAL CONTRACT AND WHETHER THE PROPERTY WAS HELD AS A CONSTRUCTIVE TRUST PRECLUDED SUMMARY JUDGMENT; PLAINTIFF ALLEGED HE PROVIDED FUNDS TO DEFENDANT TO PURCHASE PROPERTY WHICH. PURSUANT TO THE ORAL AGREEMENT, WOULD BE TRANSFERRED BY DEFENDANT TO PLAINTIFF (SECOND DEPT).

The Second Department, affirming the denial of defendant's summary judgment motion, determined there were question of fact about (1) whether part performance defeated the statute of frauds defense, (2) whether there was a fiduciary relationship between plaintiff and defendant and (3) whether the property was therefore held by defendant as a constructive trust. Plaintiff and defendant were close friends. Plaintiff alleged, pursuant to an oral agreement, he provided funds to defendant for the purchase of property which plaintiff would manage until defendant transferred it to the plaintiff. The defendant alleged there was no such agreement, plaintiff did not provide funds for the purchase of the property and defendant owned the property outright:

… [W]hile the plaintiff's work in negotiating the purchase of the subject property and in managing it might be susceptible to other explanations, his contribution of approximately $1.5 million toward its purchase, albeit partially in the form of loans from the defendant, would be "unintelligible or at least extraordinary" without reference to the alleged oral agreement … . Accordingly, the Supreme Court properly determined that although the defendant demonstrated, prima facie, that the alleged oral agreement was barred by the statute of frauds, the plaintiff raised a triable issue of fact regarding part performance … . …

The four factors to be considered in ascertaining whether the imposition of a constructive trust is warranted are the existence of a fiduciary or confidential relationship, a promise, a transfer in reliance thereon, and unjust enrichment … . …

… [T]he transaction between the plaintiff and the defendant was not arm's length but rather took place in the context of a friendship characterized not only by shared interests, cultural affiliations, and personal trust, but also by reliance on one another in business matters, including loans in the hundreds of thousands of dollars. While any single factor might not be sufficient, by itself, to establish a fiduciary relationship … . …

… [T]he terms of the agreement as described by the plaintiff and as evidenced by the parties' actions are not fatally indefinite. The "doctrine of definiteness" … should not be "applied with a heavy hand" … . …

… [T]he plaintiff's promise to manage the property and pay its expenses was "a specific, bargained for legal detriment" irrespective of its value to the defendant … . Accordingly, the alleged oral agreement does not fail for lack of consideration. Toobian v Golzad, 2021 NY Slip Op 02185, Second Dept 4-7-21

The trial in this matter was held, plaintiff prevailed, and the Second Department affirmed: Toobian v Golzad, 2021 NY Slip Op 02186, Second Dept 4-7-21

CRIMINAL LAW, ATTORNEYS.

DEFENDANT ALLEGED A PROSECUTOR WHO PARTICIPATED IN HIS PROSECUTION HAD REPRESENTED AN ACCOMPLICE IN THE SAME CRIME; DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant was entitled to a hearing on his motion to vacate his conviction. The defendant alleged a prosecutor, Vecchione, participated in his prosecution after having represented a codefendant, Bobb, in the same matter:

A prosecutor's "paramount obligation is to the public" … , and "a defendant, as an integral member of the body politic, is entitled to a full measure of fairness" from that public officer … . Here, the defendant asserts, among other things, that Vecchione was in a position to use privileged information learned through prior representation of the defendant's accomplice in the crime charged, thus giving the People an unfair advantage in the defendant's case … . Generally, a public prosecutor should not be removed from prosecuting a case "unless necessary to protect a defendant from 'actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence'" … . "[T]he appearance of impropriety, standing alone, might not be grounds for disqualification" … .

Under the particular circumstances of this case, in which evidence was presented suggesting that Vecchione was directly involved in the defendant's prosecution after having represented his accomplice in the charged crime … , questions of fact existed as to whether the defendant suffered "actual prejudice or a substantial risk of an abused confidence" so as to warrant vacatur of his conviction … . People v Breedan, 2021 NY Slip Op 02173, Second Dept 4-7-21

CRIMINAL LAW, ATTORNEYS.

DEFENDANT DEMONSTRATED (1) HE WAS MISADVISED THAT HIS GUILTY PLEA WOULD NOT RESULT IN DEPORTATION AND (2), HAD HE BEEN PROPERLY ADVISED, A DECISION TO GO TO TRIAL WOULD HAVE BEEN RATIONAL; DEFENDANT'S MOTION TO VACATE HIS CONVICTION WAS PROPERLY GRANTED (SECOND DEPT).

The Second Department, affirming Supreme Court's granting of defendant's motion to vacate his conviction, determined defendant had demonstrated at the hearing he was misadvised that the contempt charge to which he pled guilty was not a deportable offense and that he would not have pled guilty but for that misadvice:

… [T]he record supported the Supreme Court's determination that there was a reasonable probability that but for counsel's misadvice, the defendant would not have pleaded guilty to criminal contempt in the second degree … . While the

defendant did not testify at the hearing, defense counsel and the defendant's former immigration counsel both testified to his being focused on the immigration consequences of his plea and his determination to plead guilty only after being incorrectly advised that a conviction of criminal contempt in the second degree would not render him deportable … . …

"[A]n evaluation of whether an individual in the defendant's position could rationally reject a plea offer and proceed to trial must take into account the particular circumstances informing the defendant's desire to remain in the United States. Those particular circumstances must then be weighed along with other relevant factors, such as the strength of the People's evidence, the potential sentence, and the effect of prior convictions" … . The evidence elicited at the hearing established that the defendant had resided in the United States since 1988 and had five children, all citizens of the United States, whose care and well-being were priorities for him. Under the circumstances, notwithstanding the apparent strength of the People's case against the defendant, we cannot say that a decision to face the risks of proceeding to trial, including the exposure to a harsher sentence, would not have been rational. People v Saunders, 2021 NY Slip Op 02181, Second Dept 4-7-21

CRIMINAL LAW, ATTORNEYS.

THE DETECTIVE WHO CONDUCTED THE LINEUP WAS AWARE DEFENDANT WAS REPRESENTED BY AN ATTORNEY BUT DID NOT NOTIFY THE ATTORNEY OF THE LINEUP; THE IDENTIFICATION EVIDENCE SHOULD HAVE BEEN SUPPRESSED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined the detective who conducted a line-up identification with the defendant was aware defendant was represented by an attorney, but did not notify the attorney of the line-up. The identification evidence should have been suppressed:

As a general rule, a defendant does not have the right to counsel at a preaccusatory, investigatory lineup … . However, there are two exceptions. The first is when a defendant is actually represented by an attorney in the matter under investigation

and the police know, or can be charged with knowledge of, that representation … . The second is when a defendant who is already in custody and represented by an attorney in an unrelated case invokes the right by requesting his or her attorney … . In either case, "[o]nce the right to counsel has been triggered, the police may not proceed with the lineup without at least apprising the defendant's lawyer of the situation and affording the lawyer a reasonable opportunity to appear. A specific request that the lineup not proceed until counsel is so notified need not be made" … .

Here, prior to the lineup, the attorney representing the defendant on another matter spoke to the arresting officer and identified herself as the defendant's attorney. The detective who conducted the lineup testified at the suppression hearing that he was aware prior to conducting the lineup that the defendant was represented by an attorney. Moreover, the only reasonable inference from the detective's testimony was that he was aware that the defendant was represented by the attorney with respect to the robbery case under investigation. People v Marion, 2021 NY Slip Op 02177, Second Dept 4-7-21

CRIMINAL LAW.

ALTHOUGH THE EVIDENCE SUPPORTED A LEVEL TWO RISK LEVEL CLASSIFICATION, COUNTY COURT DID NOT ADDRESS DEFENDANT'S REQUEST FOR A DOWNWARD DEPARTURE; REVERSED AND REMITTED (THIRD DEPT).

The Third Department, reversing County Court, determined the level two risk level classification was supported by the evidence, but the matter must be reversed and remitted because County Court did not address defendant's request for a downward departure:

Defendant … contends that County Court abused its discretion in denying his request for a downward departure to a risk level one classification. The record discloses that defendant made such request early in the hearing, in the event that the court placed defendant in the risk level two classification, and submitted a psychological treatment summary in support thereof. Although the summary was received into

evidence and reviewed by the court, the court did not address defendant's request but proceeded to consider the substantive risk factors, ultimately concluding that defendant should be placed in the risk level two classification. Significantly, as the record does not contain any findings or conclusions with respect to defendant's request, we are unable to ascertain the court's reasoning for implicitly denying it. Consequently, we "reverse and remit so that County Court may 'determine whether or not to order a departure from the presumptive risk level indicated by the offender's guidelines factor score' and to set forth its findings of fact and conclusions of law as required" … . People v Conrad, 2021 NY Slip Op 02194, Third Dept 4-8-21

FORECLOSURE, CIVIL PROCEDURE.

THE ACCELERATION OF THE MORTGAGE DEBT UPON FILING A PRIOR FORECLOSURE ACTION WAS A NULLITY BECAUSE THE ACTION WAS DISMISSED FOR LACK OF STANDING; THE INSTANT ACTION IS THEREFORE TIMELY BUT ONLY WITH RESPECT TO THE INSTALLMENT PAYMENTS DUE DURING THE SIX YEARS PRIOR TO THE FILING OF THE INSTANT ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the prior foreclosure action which was dismissed for lack of standing did not accelerate the debt. Therefore the instant action is timely but only as to the installment payments due during the six years before the action was brought:

The instant action is the third mortgage foreclosure action commenced with respect to this loan. The first mortgage foreclosure action was commenced in or about July 2010, and was dismissed in December 2012, for lack of standing. A second mortgage foreclosure action was commenced on or about January 23, 2015, and was dismissed due to a mistake in the caption of the action. The instant action was thereafter commenced in October 2016 … . …

A mortgage foreclosure action is governed by a six-year statute of limitations (see CPLR 213[4]). Where a mortgage is payable in installments, separate causes of action accrue for each installment that is not paid, and the statute of limitations begins to run on the date each installment becomes due … . Once a mortgage debt

is accelerated, however, the statute of limitations begins to run on the entire debt … .

The first action to foreclose the mortgage, which purportedly accelerated the mortgage debt, was initiated in or about July 2010. However, that action was dismissed for lack of standing, and therefore, the alleged acceleration was a nullity … . Accordingly, the instant action is timely, but only with respect to those installments that accrued within six years of the date of commencement of the instant action … . Therefore, the plaintiff's recovery may not include any installments that became due more than six years prior to the commencement of the action, and the amount due must be recalculated to reflect that fact. Deutsche Bank Natl. Trust Co. v Limtcher, 2021 NY Slip Op 02134, Second Dept 4-7-21

FORECLOSURE, CIVIL PROCEDURE.

TWO VOLUNTARY DISCONTINUANCES OF TWO SUCCESSIVE FORECLOSURE ACTIONS TWICE REVOKED THE ACCELERATION OF THE DEBT RENDERING THE THIRD FORECLOSURE ACTION TIMELY (FIRST DEPT).

The First Department, reversing Supreme Court based upon the February, 2021 Court of Appeals ruling, determined two voluntary discontinuances of two successive foreclosure actions twice revoked the acceleration of the debt, rending the third foreclosure action timely:

… [O]n February 18, 2021, the Court of Appeals issued its decision in Freedom Mtge. Corp v Engel, — NY3d —, 2021 NY Slip Op 01090 (2021), holding, inter alia, that "where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder" (Freedom Mtge., at *6). Thus, contrary to defendants' argument, the September 2013 voluntary discontinuance of the 2009 first foreclosure action did constitute an "affirmative act," within six years, thereby revoking the prior election to accelerate. A second foreclosure action was commenced in October 2013 and discontinued in

September 2017. To the extent there is a question surrounding plaintiff's reason for discontinuing the second foreclosure action and whether that reason constituted a "contemporaneous statement" that they were not seeking to de-accelerate the debt, it does not change the fact that the third foreclosure action is timely because it was commenced within six years of the date of acceleration, which was October 2013. U.S. Bank Trust, N.A. v Boktor, 2021 NY Slip Op 02124, First Dept 4-6-21

FORECLOSURE.

PLAINTIFF BANK, AT TRIAL, FAILED TO DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 IN THIS FORECLOSURE ACTION; PLAINTIFF'S VERDICT REVERSED (SECOND DEPT).

The Second Department, reversing the plaintiff's verdict in this foreclosure action, determined the plaintiff bank did not demonstrate (at trial) that it complied with the notice requirements of RPAPL 1304:

"'In reviewing a determination . . . after a nonjury trial, this Court's power is as broad as that of the trial court, and this Court may render the judgment it finds warranted by the facts, taking into account that, in a close case, the trial court had the advantage of seeing and hearing the witnesses'" … . At the nonjury trial, the plaintiff relied upon the testimony of its sole witness, who testified as to the standard office mailing procedure of the plaintiff's prior and present loan servicer, but did not and could not attest to the practices and procedures of Walz Group, a third-party entity that was hired to undertake the requisite service of the notices on the defendants in accordance with the requirements of the mortgage agreement and RPAPL 1304. The plaintiff's witness expressly testified that she did not have familiarity with Walz Group's mailing practices "outside of their communications with" the loan servicer. In addition, the witness attested that she never mailed anything through Walz Group, was never employed by Walz Group, and was never trained by Walz Group in their procedures for mailing notices. Further, she testified that she could not say if Walz Group mailed the notices by first-class mail.

Thus, since the plaintiff's sole witness did not have "knowledge of the mailing practices of the entity which sent the notice[s]" … , and the business records that were submitted in evidence failed to show that the requisite first-class mailings of the RPAPL 1304 notices or the notices of default were actually made to the defendants or that the default notices were actually delivered to their "notice address," the plaintiff failed to establish its strict compliance with RPAPL 1304 … . Deutsche Bank Natl. Trust Co. v Bucicchia, 2021 NY Slip Op 02132, Second Dept 4-7-21

FORECLOSURE.

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not demonstrate compliance with the notice requirements of RPAPL 1304:

… [T]he plaintiff failed to establish, prima facie, its strict compliance with RPAPL 1304. In support of its motion, the plaintiff submitted the affidavit of Mahilet Ayalew, a vice president of loan documentation of Wells Fargo Bank, N.A., the plaintiff's servicer. Ayalew stated in the affidavit that 90-day notices were sent to the defendant on February 1, 2013, by regular and certified mail "in full compliance" with RPAPL 1304. The plaintiff additionally submitted copies of 90-day notices and indicia of mailing by certified mail, but not first-class mail. Ayalew's affidavit was insufficient to establish that the notices were actually mailed since Ayalew did not aver that she had personal knowledge of the mailing or that she was familiar with the servicer's standard office mailing practices and procedures … . HSBC Bank USA, N.A. v Cardona, 2021 NY Slip Op 02138, Second Dept 4-7-21

FREEDOM OF INFORMATION LAW (FOIL).

RESPONDENT CITY DID NOT DEMONSTRATE THE FOIL REQUEST WOULD INTERFERE WITH LAW ENFORCEMENT OR JUDICIAL PROCEEDINGS OR WOULD REVEAL A CONFIDENTIAL SOURCE; MATTER REMITTED FOR IN CAMERA REVIEW TO DETERMINE WHETHER THE FOIL REQUEST WAS PROTECTED BY THE INTER- OR INTRA- AGENCY MATERIALS EXEMPTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined that two of the grounds for denying the FOIL request were invalid and the third, the inter-agency or intra-agency materials exemption, could not be assessed absent an in camera review of the documents. The matter was remitted:

Respondent failed to meet its burden of establishing that disclosure of any records responsive to petitioner's FOIL request would "interfere with law enforcement investigations or judicial proceedings" … . This exemption "ceases to apply after enforcement investigations and any ensuing judicial proceedings have run their course" … . …

Respondent also failed to establish that disclosure would "identify a confidential source or disclose confidential information relating to a criminal investigation" … , "in the absence of any evidence that [any] person received an express or implied promise of confidentiality'" … . Respondent's assertion that disclosure would reveal nonroutine "criminal investigative techniques or procedures" … is conclusory.

The email messages submitted by petitioner in support of the article 78 petition are covered by the inter-agency or intra-agency materials exemption … because they amount to "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making"… . However, the applicability of this exemption to any other responsive records cannot be determined on this record in the absence of in camera review … . Matter of Jewish Press, Inc. v New York City Dept. of Investigation, 2021 NY Slip Op 02108, First Dept 4-6-21

INSURANCE LAW, CIVIL PROCEDURE, PERSONAL INJURY.

IN THIS COMPLEX EXCESS INSURANCE CASE, WHICH INCLUDED A REVERSAL BY THE COURT OF APPEALS, THE LAW-OF-THE-CASE AND RES-JUDICATA DOCTRINES DID NOT DICTATE THE OUTCOME AND THE EXCESS INSURANCE CARRIER WAS NOT OBLIGATED TO DEFEND OR INDEMNIFY IN THE UNDERLYING PERSONAL INJURY ACTION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, reversing Supreme Court, determined that RLI, an excess insurance carrier, was not obligated to defend or indemnify in the underlying personal injury action. In the underlying action, plaintiff, an employee of Transel Elevator, was working on an elevator at a hotel and was injured descending stairs at the hotel. The complex relationships among the parties and several insurance carriers cannot be fairly summarized here. What follows in the First Department's summary of the case. In essence the First Department held that prior rulings did not dictate the outcome here under law-of-the-case or res-judicata principles:

Plaintiff Aspen Specialty Insurance Company commenced this action seeking a declaration that the excess insurance policy issued by RLI Insurance Company, Inc. was next in order of coverage for a personal injury action, in which Aspen and RLI's common insured, Alphonse Hotel Corporation, was a defendant. The issue in this case is whether RLI, an excess insurer with a follow form policy, is bound by a prior judicial determination of this Court that the primary policy issued by Ironshore Indemnity Inc., which underlies RLI's excess policy, covers the defendant in the personal injury action, Alphone, as an additional insured. In the prior declaratory judgment action between Aspen and Ironshore, this Court declared that the language in the additional insured endorsement extends coverage broadly to any injury causally linked to the named insured, which was satisfied in this case because the loss involved an employee of the named insured who was injured while performing the named insured's work under the contract with the additional insured. RLI argues that it is not bound by this Court's prior determination because it was not part of the prior declaratory judgment action. In the present declaratory judgment action, RLI wishes to relitigate the issue of whether Ironshore's policy covers Alphonse as an additional insured. RLI relies upon the 2017 Court of Appeals decision in Burlington

Ins. Co. v NYC Tr. Auth. (29 NY3d 313 [2017]), which interpreted language in an additional insured endorsement similar to the language here as covering the additionally insured party, vicariously, only for negligent acts of the named insured. It is undisputed in the instant case that the named insured was not in control of the instrumentality of the accident that caused the underlying personal injuries. … RLI is not bound by our prior determination and that it is entitled to a declaration that it has no obligation to defend or indemnify in the underlying personal injury action. Aspen Specialty Ins. Co. v RLI Ins. Co., Inc., 2021 NY Slip Op 02092, First Dept 4-6-21

NEGLIGENCE, MUNICIPAL LAW.

AFTER THE CITY MOVED FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE ON THE GROUND IT DID NOT HAVE WRITTEN NOTICE OF THE ICY CONDITION, THE PLAINTIFFS, YEARS AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED, MOVED FOR LEAVE TO AMEND THE NOTICE OF CLAIM TO ALLEGE THE CITY CREATED THE DANGEROUS CONDITION; THE PLAINTIFFS SHOULD NOT HAVE BEEN ALLOWED TO AMEND THE NOTICE OF CLAIM AND THE CITY SHOULD HAVE BEEN AWARDED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs in this slip and fall case should not have been allowed to amend the notice of claim to add the allegation that the city created the icy condition in the parking garage. The city had moved for summary judgment because it did not have written notice of the condition. The plaintiffs then moved for leave to amend the notice of claim, years after the expiration of the statute of limitations. The city was entitled to summary judgment:

"'A plaintiff seeking to recover in tort against a municipality must serve a notice of claim to enable authorities to investigate, collect evidence and evaluate the merits of the claim'" … . "'A notice of claim must set forth, inter alia, the nature of the claim, and the time, place, and manner in which the claim arose'" … . "Under General Municipal Law § 50-e(6), '[a] notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to

substantively change the nature of the claim or the theory of liability'" … . Here, contrary to the court's determination, the proposed amendment to the notice of claim was not to correct a technical mistake, defect, or omission within the meaning of General Municipal Law § 50-e(6), but rather, improperly sought "to assert a new theory of affirmative negligence several years after the . . . applicable limitations period" … . Congero v City of Glen Cove, 2021 NY Slip Op 02131, Second Dept 4-7-21