

# NEW YORK APPELLATE DIGEST, LLC

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**ADVISORY DECISIONS, RES JUDICATA, COLLATERAL ESTOPPEL, LAW OF THE CASE.**

**SUPREME COURT HAD THE AUTHORITY UNDER CPLR 3001 TO ISSUE A DECLARATORY JUDGMENT ON THE PROPER RATE FOR POST-JUDGMENT INTEREST; ANOTHER COURT’S PRIOR DISCUSSION OF THE PROPER INTEREST RATE WAS MERELY ADVISORY (I.E., NOT ON THE MERITS) AND THEREFORE WAS NOT SUBJECT TO THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL OR LAW OF THE CASE (SECOND DEPT).**

*Matter of B.Z. Chiropractic, P.C. v Allstate Ins. Co., 2021 NY Slip Op 04484, Second Dept 7-21-21*

Practice Point: A discussion in a decision which is merely advisory--here a discussion regarding the appropriate interest rate on a judgment—does not trigger the res judicata, collateral estoppel, or law of the case doctrines.

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**APPEALS.**

**IN THIS FORECLOSURE ACTION PLAINTIFF’S ATTORNEY DID NOT FILE AN AFFIRMATION AS REQUIRED BY AN ADMINISTRATIVE ORDER; THE MAJORITY DID NOT ADDRESS THE ISSUE BECAUSE IT SHOULD HAVE BEEN RAISED IN A PRIOR APPEAL WHICH DEFENDANT DID NOT PERFECT; THE DISSENT ARGUED THE ISSUE COULD AND SHOULD BE CONSIDERED ON THIS APPEAL (THIRD DEPT).**

*HSBC Bank USA, N.A. v Sage, 2021 NY Slip Op 04583, Third Dept 7-29-21*

Practice Point: An issue which should have been raised in a prior appeal which was not perfected will not be considered in a subsequent appeal.

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**ARTICLE 78, JURISDICTIONAL DEFECT, STATUTE OF LIMITATIONS.**

**A TIMELY BUT DEFECTIVE ATTEMPT TO COMMENCE AN ARTICLE 78 PROCEEDING IS A JURISDICTIONAL DEFECT WHICH CANNOT BE CURED BY A SECOND ATTEMPT AFTER THE FOUR-MONTH STATUTE OF LIMITATIONS HAS RUN (FIRST DEPT).**

*Matter of Heffernan v New York City Mayor's Off. of Hous. Recovery Operations, 2021 NY Slip Op 04276, First Dept 7-8-21*

Practice Point: An attempt to commence an Article 78 proceeding which is rejected because of noncompliance with the CPLR and the NYCRR is a jurisdictional defect which cannot be cured after the four-month statute of limitations has expired.

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**ATTORNEYS (WITHDRAWAL OF), DEFAULT, APPEALS.**

**MOTHER'S ATTORNEY SHOULD NOT HAVE BEEN ALLOWED TO WITHDRAW WITHOUT NOTICE TO MOTHER WHO DID NOT ATTEND THE TERMINATION-OF-PARENTAL-RIGHTS HEARING; THE DEFAULT ORDER TERMINATING MOTHER'S PARENTAL RIGHTS WAS THEREFORE IMPROPER AND APPEAL IS NOT PRECLUDED (FOURTH DEPT).**

*Matter of Calvin L.W. (Dominique H.), 2021 NY Slip Op 04470, Fourth Dept 7-15-21*

Practice Point: In this Family Court proceeding, mother's attorney should not have been allowed to withdraw in her absence (without notice to her). Because mother was not given notice of the attorney's motion to withdraw, she was not in default and appeal is therefore not precluded.

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**ATTORNEYS, SETTLEMENT EMAILS, ELECTRONIC SIGNATURES.**

**A SETTLEMENT EMAIL WILL BE DEEMED SIGNED BY THE SENDING ATTORNEY WITHOUT RETYPING THE ATTORNEY’S NAME IN THE EMAIL (FIRST DEPT).**

*Matter of Philadelphia Ins. Indem. Co. v Kendall, 2021 NY Slip Op 04284, First Dept 7-8-21*

Practice Point: In the First Department, as long as the attorney sending the settlement email is identified in the email, there is no need for the attorney to type his or her name in the email to effect a valid “electronic signature.”

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**DEBTOR-CREDITOR, NOTES, ACCELERATION CLAUSE.**

**THE FULL AMOUNT OF THE NOTE WAS NOT RECOVERABLE BECAUSE THERE WAS NO ACCELERATION CLAUSE; CLAIMS FOR UNPAID INSTALLMENTS DUE MORE THAN SIX YEARS BEFORE FILING SUIT WERE TIME-BARRED (FOURTH DEPT).**

*Estate of Kathryn Essig v Essig, 2021 NY Slip Op 04301, Fourth Dept 7-9-21*

Practice Point: The full amount of a note which does not have an acceleration clause requiring payment of the full amount upon missing an installment is not recoverable. Only the installments missed during the six years prior to filing suit are recoverable.

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## **DISCOVERY, APPEALS.**

**DISCOVERY REQUESTS AIMED AT AN ISSUE WHICH WAS ADMITTED BY DEFENDANTS SHOULD NOT HAVE BEEN GRANTED; BECAUSE THE ALTERNATIVE ARGUMENT FOR THE DISCOVERY REQUESTS WAS NOT SUPPORTED BY A MEMO IN THE RECORD DEMONSTRATING THE ISSUE WAS PRESERVED, THE ARGUMENT WAS REJECTED (FOURTH DEPT).**

*Brennan v Demydyuk, 2021 NY Slip Op 04425, Fourth Dept 7-16-21*

Practice Point: A discovery request which relates to an admitted issue should not be granted.

Practice Point: If you raise an issue on appeal which was only addressed in a memo submitted to the trial court, include the memo in the record on appeal or it will be deemed unpreserved.

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## **DISCOVERY, HABIT OR CUSTOM.**

**IN THIS CHILD-VICTIMS-ACT SEXUAL-ABUSE (NEGLIGENT-SUPERVISION) ACTION AGAINST THE CATHOLIC DIOCESE OF ALBANY, PLAINTIFFS' DISCOVERY REQUEST FOR THE FILES OF SEVERAL NONPARTY PRIESTS WAS PROPERLY GRANTED ON THE GROUND THE FILES MAY REVEAL A "HABIT" OR "CUSTOM" REGARDING HOW THE DIOCESE HANDLED SUSPECTED CHILD-SEXUAL-ABUSE (THIRD DEPT).**

*Melfe v Roman Catholic Diocese of Albany, N.Y., 2021 NY Slip Op 04179, Third Dept 7-1-21*

Practice Point: Discovery which may reveal a party's habit or custom in dealing with a relevant issue should be allowed. In this Child Victims Act action against a Catholic Diocese evidence of how the Diocese dealt with priests suspected of sexually abusing children was deemed discoverable.

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**FORECLOSURE, BUSINESS RECORDS.**

**DEFENDANTS' DEFAULT IN MAKING MORTGAGE PAYMENTS WAS NOT SUPPORTED BY THE SUBMISSION OF THE RELEVANT BUSINESS RECORDS; THEREFORE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).**

*.Wilmington Sav. Fund Socy., FSB v McLaughlin, 2021 NY Slip Op 04576, Second Dept 7-28-21*

Practice Point: When relying on business records for summary judgment, the affidavit must describe the records and the records must be attached.

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**FORECLOSURE, DEFAULT, BUSINESS RECORDS, REFEREE'S REPORT.**

**ALTHOUGH DEFENDANT WAS IN DEFAULT IN THIS FORECLOSURE ACTION, SHE STILL CAN CONTEST THE AMOUNT OWED; THE REFEREE'S REPORT HERE WAS REJECTED BECAUSE IT WAS BASED IN PART ON UNPRODUCED BUSINESS RECORDS AND THE MATTER WAS REMITTED FOR RECALCULATION (SECOND DEPT).**

*Wells Fargo Bank, N.A. v Campbell, 2021 NY Slip Op 04574, Second Dept 7-28-21*

Practice Point: A defendant who is in default in a foreclosure action can still contest the amount owed.

Practice Point: A referee's report which relies on business records which were not produced should be rejected.

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## **JUDGES.**

**THE JUDGE SHOULD NOT HAVE DISMISSED DEFENDANTS' AFFIRMATIVE DEFENSES BECAUSE PLAINTIFF DID NOT REQUEST THAT RELIEF (SECOND DEPT).**

*MacKay v Paliotta, 2021 NY Slip Op 04348, Second Dept 7-15-21*

Practice Point: A judge is only authorized to grant relief which has been requested by a party.

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## **JURIES, JUDGES.**

**THE REFUSAL OF DEFENDANT'S REQUEST TO POLL THE JURY REQUIRED A NEW TRIAL (FOURTH DEPT).**

*Fitzgerald v Kula, 2021 NY Slip Op 04452, Fourth Dept 7-16-21*

Practice Point: It is reversible error to refuse a request to poll the jury.

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## **PARTIES, SUBSTITUTION AFTER DEATH.**

**ALTHOUGH DOMINICA, THE EXECUTRIX OF JOSEPHINE'S ESTATE, WAS NEVER SUBSTITUTED FOR JOSEPHINE AFTER JOSEPHINE'S DEATH, DOMINICA APPEARED AND ACTIVELY LITIGATED A MOTION TO VACATE; THE FAILURE TO EFFECT SUBSTITUTION IN THAT CIRCUMSTANCE IS A MERE IRREGULARITY; TWO-JUSTICE DISSENT (FOURTH DEPT).**

*Matter of Robinson v Kathleen B., 2021 NY Slip Op 04320, Fourth Dept 7-9-21*

Practice Point: Here the failure to substitute the executrix of the estate for the party who died during the ongoing litigation was excused as a mere irregularity.

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**SEPARATE TRIALS, DIFFERENT THEORIES, SAME EVIDENCE, ONE APPEALABLE JUDGMENT.**

**SEPARATE TRIALS WERE HELD ON THE TORT AND BREACH OF CONTRACT ACTIONS STEMMING FROM DAMAGE TO PLAINTIFFS' BUILDING CAUSED BY RENOVATION OF DEFENDANT'S NEIGHBORING BUILDING; THE DAMAGES AWARDED IN EACH ACTION WERE BASED UPON THE SAME EVIDENCE OF THE COST OF REPAIR AND ALTERNATE LIVING EXPENSES BUT THE AMOUNTS OF THE AWARDS DIFFERED; SUPREME COURT PROPERLY ENTERED THE DAMAGES AWARDED IN THE BREACH OF CONTRACT ACTION, PLUS INTEREST AND ATTORNEY'S FEES, AS THE APPEALABLE FINAL JUDGMENT (FIRST DEPT).**

[Shah v 20 E. 64th St., LLC, 2021 NY Slip Op 04587, First Dept 7-29-21](#)

Practice Point: Here a tort action and breach of contract action stemming from damage to plaintiff's building caused by renovation of a neighboring building were tried separately, one a jury trial, one a bench trial. The evidence was the same but the damages awards were different. The judge properly chose the higher damages award as the final appealable judgment,

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