NEW YORK APPELLATE DIGEST, LLC

Weekly Newsletter
August 16 – 20, 2021

An Organized Compilation of the Summaries of Selected Decisions Released by Our New York State Appellate Courts the Week of August 16 – 20, 2021, and Posted on the New York Appellate Digest Website on Monday August 23, 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 on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Newsletter.

Contents

Table of Contents

Table of Contents

APPEALS, CIVIL PROCEDURE, CRIMINAL LAW.

THE DENIAL OF A MOTION TO SEAL A CRIMINAL CONVICTION IS CIVIL IN NATURE AND CAN BE APPEALED AS A MATTER OF RIGHT; HERE THE DEFENDANT'S MOTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (SECOND DEPT).

The Second Department, reversing County Court, determined defendant could appeal the denial of his motion to seal his conviction record because the sealing procedure is civil in nature. In addition, the Second Department held defendant was entitled to a hearing on the motion:

Although a motion pursuant to CPL 160.59 relates to a criminal matter, "it does not affect the criminal judgment itself, but only a collateral aspect of it—namely, the sealing of the court record," and, therefore, is civil in nature … . As such, the defendant is entitled to appeal as of right from the subject order denying the 2020 motion, which was made upon notice to the People (see CPLR 5701[a][2][v] …). * * *

By using the word "shall," the Legislature clearly and unambiguously provided that when the motion is not subject to mandatory denial under CPL 160.59(3) and the district attorney opposes the motion, the motion court does not have the discretion to dispense with the hearing requirement, even where, as here, the court had held a hearing on the defendant's prior CPL 160.59 motion ,,, , Further, CPL 160.59 is a remedial statute, and remedial statutes should be interpreted broadly to accomplish their goals … . People v Bugge, 2021 NY Slip Op 04718, Second Dept 8-18-21

CIVIL PROCEDURE, DEBTOR-CREDITOR.

SUPREME COURT. PURSUANT TO CPLR ARTICLE 77, PROPERLY RESOLVED THE DISTRIBUTION OF A $4.5 BILLION GLOBAL SETTLEMENT PAYMENT BY JP MORGAN CHASE IN THIS RESIDENTIAL-MORTGAGE-BACKED-SECURITIES-RELATED ACTION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, determined Supreme Court properly resolved the distribution pursuant to CPLR article 77 of a $4.5 billion global settlement payment by JPMorgan Chase to investors to be made by residential mortgage-backed securities (RMBS) trusts. The opinion is detailed, fact-specific and cannot be fairly summarized here. The rulings are specific to provisions included in or absent from the relevant pooling and servicing agreements (PSA's). Matter of Wells Fargo Bank v Aegon USA Inv. Mgt., LLC, 2021 NY Slip Op 04740, First Dept 8-19-21

CIVIL PROCEDURE, ELECTION LAW.

THE STATUTE OF LIMITATIONS FOR SERVICE OF THE PETITION TO INVALIDATE A CERTIFICATE OF NOMINATION RAN OUT ON JULY 12; THE FACT THAT THE ORDER TO SHOW CAUSE ORDERED SERVICE BY JULY 19 DID NOT EXTEND THE STATUTE OF LIMITATIONS BEYOND JULY 12 (THIRD DEPT).

The Third Department determined the petition to invalidate a certificate of nomination was properly dismissed as untimely. The fact that the order to show cause directing service of the petition by a date which was beyond the statute of limitation was of no consequence:

… Election Law § 16-102 (2) provides … that "[a] proceeding with respect to a primary, convention, meeting of a party committee, or caucus shall be instituted within [10] days after the holding of such primary or convention or the filing of the certificate of nominations made at such caucus or meeting of a party committee." A special proceeding, in turn, is commenced by the filing of a petition … . Notably,

"[a] petitioner raising a challenge under Election Law § 16-102 must commence the proceeding and complete service on all the necessary parties within the period prescribed by Election Law § 16-102 (2). In order to properly complete service, actual delivery must occur no later than the last day upon which the proceeding may be commenced" … . As the certificate of nomination … was filed on July 2, 2021, the last day upon which to commence this proceeding was July 12, 2021.

Even accepting as true that the petition was timely filed on July 12, 2021, the fact remains … that none of the named respondents was served with the petition prior to the expiration of the statute of limitations. To the extent that petitioners rely upon the service provisions embodied in the order to show cause, which permitted service by various means on or before July 19, 2021, such reliance is misplaced. A court cannot extend the time within which to commence an action or proceeding (see CPLR 201 ,,,). Matter of Facteau v Clinton County Bd. of Elections, 2021 NY Slip Op 04743, Third Dept 8-18-21

CIVIL PROCEDURE, REPLY PAPERS.

SUPREME COURT SHOULD NOT HAVE CONSIDERED DEFENDANT'S ARGUMENT RAISED FOR THE FIRST TIME IN REPLY PAPERS; DEFENDANT ORIGINALLY MOVED FOR SUMMARY JUDGMENT AND THEN ARGUED IN REPLY PAPERS IT HAD INTENDED TO MAKE A MOTION TO DISMISS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant P & C Merrick's motion to dismiss the complaint, asserted for the first time in reply papers, should not have been considered by the court. P & C Merrick had initially moved for summary judgment:

The Supreme Court erred in considering P & C Merrick's contention, raised for the first time in reply, that it intended to move pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against it rather than moving for summary judgment dismissing the complaint insofar as asserted against it. There is no indication in the record that the plaintiff had an opportunity to respond to P & C Merrick's reply and to submit papers in surreply … . Thus, the court should not have addressed the

arguments raised by P & C Merrick for the first time in its reply papers … . As these new legal arguments were the basis for directing dismissal of the causes of action alleging specific performance and breach of contract, the plaintiff was prejudiced, and the Supreme Court erred in directing dismissal of those causes of action. Grocery Leasing Corp. v P&C Merrick Realty Co., LLC, 2021 NY Slip Op 04701, Second Dept 8-18-21

CONTRACT LAW, CIVIL PROCEDURE.

THE RELEASE WAS VALID EVEN THOUGH PLAINTIFF DID NOT UNDERSTAND ENGLISH; CPLR 2101, WHICH REQUIRES DOCUMENTS IN A FOREIGN LANGUAGE WHICH ARE FILED OR SERVED BE ACCOMPANIED BY AN ENGLISH TRANSLATION, DOES NOT APPLY BECAUSE THE RELEASE WAS IN ENGLISH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the release executed by plaintiff with respect to defendant M & I was valid, despite the fact that plaintiff did not understand English:

A person who does not understand the English language is not automatically excused from complying with the terms of a signed agreement, since such person must make a reasonable effort to have the agreement made clear to him or her … . Here, the deposition testimony of the injured plaintiff … demonstrates that the terms of the release were explained to the injured plaintiff before he executed the document … . Furthermore, contrary to the plaintiffs' contention, the Supreme Court erred in determining that CPLR 2101(b) precluded consideration of the release. That statute provides that papers to be "served or filed shall be in the English language" and "[w]here an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate" (CPLR 2101[b]). Here, the release was written in English. Ivasyuk v Raglan, 2021 NY Slip Op 04706, Second Dept 8-18-21

CONTRACT LAW.

PLAINTIFF NURSING HOME ALLEGED DEFENDANT "THIRD-PARTY" BREACHED OBLIGATIONS IMPOSED BY THE NURSING HOME ADMISSION AGREEMENT CONCERNING PAYMENT OF THE COSTS INCURRED BY THE RESIDENT; THE NURSING HOME'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Miller, determined plaintiff nursing home's motion for summary judgment in this breach of contract action should not have been granted and defendant's motion for summary judgment dismissing the action for "breach of a contractual duty to cooperate" should have been granted. The contract at issue is the nursing home's admission agreement, which includes obligations imposed upon defendant "third-party" in connection with paying for the costs incurred by the resident of the nursing home. The opinion is fact-specific and analyzes the breach of contract allegations as they relate to specific provisions in the admission agreement. The analysis is too detailed to fairly summarize here. The court described the salient issues as follows:

Under state and federal law, a nursing facility is prohibited from requiring a third party to guarantee the payment of a resident as a condition of the resident's admission to the facility. As this case illustrates, however, a nursing facility is permitted to require a third party to undertake other kinds of contractual obligations, and a nursing facility may recover damages that were proximately caused by a failure of the third party to fulfil those obligations. Where it is alleged that a variety of different contractual obligations have been breached, each such theory of liability must be proved, defended, and analyzed independently. Where an admissions agreement containing pages of third-party obligations is both a requirement for admission and aggressively enforced, the fine legal distinctions between an unlawful third party guarantee and a lawful agreement laden with additional affirmative obligations may have little practical significance for the third party. This is especially true where, as here, the nursing facility's litigation is directed solely at the third party, and recovery is not sought from the estate of the actual resident of the

nursing facility. Wedgewood Care Ctr., Inc. v Kravitz, 2021 NY Slip Op 04731, Second Dept 8-18-21

CRIMINAL LAW, INCLUSORY CONCURRENT COUNTS.

MURDER SECOND COUNTS WERE INCLUSORY CONCURRENT COUNTS OF MURDER FIRST AND SHOULD HAVE BEEN DISMISSED; FORMER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE (SECOND DEPT).

The Second Department, reversing (modifying) County Court, determined the second degree murder counts should have been dismissed as inclusory concurrent counts of first degree murder, and the former appellate counsel was ineffective in failing to raise that issue:

… [F]ormer appellate counsel was ineffective for failing to contend on appeal that … the defendant's convictions of murder in the second degree, and the sentences imposed thereon, must be vacated, and those counts of the indictment dismissed, because those charges are inclusory concurrent counts of the conviction of murder in the first degree … . People v Davis, 2021 NY Slip Op 04720, Second Dept 8-18-21

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE JUDGE'S LAW CLERK WAS A DA WHO HAD WORKED ON DEFENDANT'S CASE; THE JUDGE SHOULD HAVE RECUSED HIMSELF FROM THE SENTENCING (SECOND DEPT).

The Second Department, vacating defendant's sentence, determined the judge should have recused himself from the sentencing because his law clerk was a former DA who had worked on the case. The issue was not preserved but was considered in the interest of justice:

The defendant's contention that the trial justice should have recused himself from presiding over the sentencing proceeding, on the ground that the justice's law clerk was a former Queens County Assistant District Attorney who, in that capacity, had worked on the early stages of this case, is unpreserved for appellate review. We nevertheless reach this contention in the exercise of our interest of justice jurisdiction (see CPL 470.05[2]). For the reasons discussed in our decision and order on an appeal by the defendant's codefendant (People v Hymes, 193 AD3d 975), the trial justice should have recused himself from presiding over the sentencing proceeding (see People v Suazo, 120 AD3d 1270).

Accordingly, we vacate the sentence imposed, and remit the matter to the Supreme Court, Queens County, for resentencing before a different Justice. People v McPhee, 2021 NY Slip Op 04723, Second Dept 8-18-21

FAMILY LAW, CIVIL PROCEDURE.

THE REFEREE DID NOT HAVE THE AUTHORITY TO PRECLUDE DEFENDANT FROM PRESENTING EVIDENCE AS AN APPARENT SANCTION FOR DEFENDANT'S FAILURE TO APPEAR; THE REFEREE'S REPORT SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this matrimonial matter should not have been confirmed because the referee exceeded her authority by ruling the defendant could not present any evidence, an apparent sanction for defendant's failure to appear:

"A referee derives his or her authority from an order of reference by the court, and the scope of the authority is defined by the order of reference" (… see CPLR 4311). "A referee who attempts to determine matters not referred to him or her by the order of reference acts beyond and in excess of his or her jurisdiction" … . Where, as here, the parties did not consent to the determination of any issues by the referee, and the order of reference directed the referee to hear and report (see CPLR 4317 [a]), "the referee had the power only to hear and report his [or her] findings"… .

Here, the Referee exceeded her authority to hear and report her findings based upon the evidence presented at trial by making a determination to preclude the defendant from presenting a case … . Pursuant to CPLR 4201, a referee assigned to hear and report "shall have the power to issue subpoenas, to administer oaths and to direct the parties to engage in and permit such disclosure proceedings as will expedite the disposition of the issues." However, neither CPLR 4201 nor any other provision confers the authority on a referee assigned to hear and report to impose a penalty on a party for failing to appear, such as precluding that party from presenting any evidence. Pulver v Pulver, 2021 NY Slip Op 04727, Second Dept 8-18-21

FAMILY LAW, CRIMINAL LAW.

THE JUVENILE DELINQUENCY ADJUDICATION WAS AFFIRMED; TWO DISSENTERS ARGUED THE PROOF THE JUVENILE KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVED HIS MIRANDA RIGHTS WAS INSUFFICIENT (SECOND DEPT).

Although the Second Department affirmed the juvenile delinquency adjudication, two dissenters argued the presentment agency did not prove the juvenile was capable of knowingly, voluntarily and intelligently waiving his Miranda rights. The juvenile's expert provided evidence of the juvenile's limited intellectual functioning:

From the dissent:

The expert's uncontradicted opinion was that the appellant had "fundamental problems" in understanding and comprehending Miranda rights. Specifically, the appellant believed that he had to waive his right to remain silent in order to find out what the detectives were questioning him about. The appellant did not understand what it meant for a statement to be "used against him." Further, he did not understand the role of an attorney in the context of an interrogation.

Given the appellant's young age, low IQ scores, and limited intellectual functioning, there are serious doubts about the appellant's ability to knowingly and intelligently waive his Miranda rights under the circumstances … . Notably, the Presentment Agency did not introduce any expert testimony contradicting the conclusions

reached by the appellant's expert forensic psychologist … . The conclusions of the appellant's expert were confirmed by the appellant's educational records showing that he had been selected for an individualized education plan (hereinafter IEP) and had consistently been evaluated as having intellectual disabilities, including a low IQ with reading, listening, and comprehension difficulties. Matter of Tyler L., 2021 NY Slip Op 04713, Second Dept 8-18-21

FAMILY LAW, DEBTOR-CREDITOR.

THE STIPULATION OF DIVORCE DIVESTED THE HUSBAND OF HIS RIGHTS IN THE MARITAL PROPERTY; THEREFORE THE HUSBAND'S JUDGMENT CREDITOR COULD NOT REACH THE PROPERTY EVEN THOUGH THE HUSBAND'S NAME REMAINED ON THE DEED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the stipulation of divorce awarding the marital property to the wife, Tiozzo, controlled such that the property could not be reached by the husband's, Dangin's, judgment creditor, Lenz. Lenz unsuccessfully argued the property was fair game because Dangin's name remained on the deed:

The stipulation of divorce thus divested Dangin of his rights in the subject property. Under CPLR article 52 a judgment creditor may only seek to enforce its money judgment against a judgment debtor's property. "Property" under CPLR 5201(b), whether realty or personalty, is defined broadly as an interest that is present or future, vested or contingent … . However, the determining factor as to whether a judgment debtor's interest can constitute property vulnerable to a judgment creditor is whether it "could be assigned or transferred" (CPLR 5201[b]). In the stipulation of divorce Dangin gave up any right to assign or transfer to a third party an interest in the subject property. The subject property is therefore beyon.d the reach of Lenz … . Tiozzo v Dangin, 2021 NY Slip Op 04739, First Dept 8-19-21

NEGLIGENCE, MUNICIPAL LAW, SLIP AND FALL.

IN A SIDEWALK SLIP AND FALL CASE, WHERE THE VILLAGE CODE REQUIRES WRITTEN NOTICE OF THE DEFECT BE GIVEN TO THE VILLAGE CLERK AS A CONDITION PRECEDENT TO LIABILITY, PROOF THAT WRITTEN NOTICE WAS GIVEN TO SOME OTHER VILLAGE OFFICER OR ENTITY WILL NOT DEFEAT THE VILLAGE'S MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the village's motion for summary judgment in this sidewalk slip and fall case should have been granted. The village code provided the village would not be liable unless written notice of the condition had been given to the village clerk. Here the notice was apparently given to another village officer or body:

Village Code § 59-l provides that "[n]o civil actions shall be maintained against the Village for damages or injuries to persons or property sustained" from a defect in Village property "unless written notice" of the defect "was actually given to the Village Clerk and there was a failure or neglect within a reasonable time after the receipt of such written notice to repair or remove the defect." Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous condition which comes within the ambit of the law unless it has received prior written notice of the alleged defect or dangerous condition pursuant to the terms of the prior written notice law, or an exception to the prior written notice requirement applies … .

Here, the Village established its prima facie entitlement to judgment as a matter of law by submitting, inter alia, an affidavit from the Village Clerk, who averred that she had conducted a search of the records contained in the Office of the Village Clerk and that there was no prior written notice of the alleged defective condition that caused the injured plaintiff's accident.

In opposition, the plaintiffs failed to raised a triable issue of fact as to whether the Village Clerk had received prior written notice of the alleged defective condition. Evidence that written notice may have been provided to another Village officer or

body did not give rise to a triable issue of fact, since Village Code § 59-l requires that written notice be actually given to the Village Clerk … . Hiller v Village of Warwick, 21 NY Slip Op 04704, Second Dept 8-18-21

NEGLIGENCE, SLIP AND FALL.

AN INSPECTION OF THE BLACKTOP FIVE TO SEVEN WEEKS BEFORE PLAINTIFF ALLEGEDLY STEPPED IN A HOLE AND FELL DID NOT DEMONSTRATE DEFENDANT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant in this slip and fall case did not demonstrate it did not have constructive notice of the hole in the blacktop where plaintiff allegedly fell:

"To meet its initial burden on the issue of lack of constructive notice, [a] defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" … .

Here, the defendants submitted evidence that a paving contractor inspected the parking lot prior to the plaintiff's accident, and found no defective conditions in the area of the plaintiff's accident. However, that inspection occurred approximately five to seven weeks prior to the plaintiff's accident … . Moreover, although the defendants' property manager submitted an affidavit in which she attested that she did not find any potholes or pothole-type conditions during her inspection of the area a few days after the plaintiff's accident, her contemporaneous notes and her deposition testimony acknowledged that she found, and had repaired, three "tiny holes" or "small spots by each curb curve" in the subject parking lot. Hughes v Tower Crestwood 2015, LLC, 2021 NY Slip Op 04705, Second Dept 8-18-21

NEGLIGENCE, TRAFFIC ACCIDENTS, EMPLOYMENT LAW, WORKERS' COMPENSATION.

DEFENDANT DID NOT DEMONSTRATE PLAINTIFF IN THIS TRAFFIC ACCIDENT CASE WAS A SPECIAL EMPLOYEE OR A CO-EMPLOYEE OF DEFENDANT AT THE TIME OF THE ACCIDENT; THEREFORE DEFENDANT'S WORKERS' COMPENSATION AFFIRMATIVE DEFENSE SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's "Workers'-Compensation-exclusive-recovery" defense should have been dismissed. Plaintiff was involved in a traffic accident driving defendant's van, which plaintiff alleged was not properly maintained. Defendant unsuccessfully argued plaintiff was a special employee or a co-employee of defendant and therefore plaintiff's only remedy was Workers' Compensation:

"Generally, workers' compensation benefits are the sole and exclusive remedy of an employee against an employer or co-employee for injuries sustained in the course of employment (see Workers' Compensation Law §§ 11, 29[6] …). "For purposes of the Workers' Compensation Law, a person may be deemed to have more than one employer—a general employer and a special employer … . "A special employee is 'one who is transferred for a limited time of whatever duration to the service of another,' and limited liability inures to the benefit of both the general and special employer" … . Many factors are weighed in deciding whether a special employment relationship exists, and generally no single one is decisive. Principal factors include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business. The most significant factor is who controls and directs the manner, details, and ultimate result of the employee's work" … . * * *

… [T]he evidence did not support a conclusion that a special employment relationship existed between the plaintiff and the defendant … at the time of the accident. Furthermore, the evidence indicated that the defendant was not a co-

employee of the plaintiff at … the time of the accident. The defendant testified that prior to [the accident], he … began working for another car service company, and that, at the time of the accident, he was in Texas training for another employment opportunity. Chiloyan v Chiloyan, 2021 NY Slip Op 04696, Second Dept 8-18-21