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An Organized Compilation of the Summaries of Selected Decisions Released by Our New York State Appellate Courts the Week of August 9 – 13, 2021, and Posted on the New York Appellate Digest Website on Monday, August 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 on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Newsletter.

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CIVIL PROCEDURE, FAILURE TO PROSECUTE.

A DISMISSAL OF A COMPLAINT FOR FAILURE TO PROSECUTE (CPLR 3215) IS NOT ON THE MERITS AND THEREFORE IS NOT "WITH PREJUDICE" (SECOND DEPT).

The Second Department noted that a dismissal of a complaint for failure to prosecute pursuant to CPLR 3215 (c) is not on the merits and therefore should not be "with prejudice:"

… [T]he court should not have directed dismissal of the complaint with prejudice, as "a dismissal under CPLR 3215(c) is a dismissal for a failure to prosecute and consequently [is] not a dismissal on the merits or with prejudice" … . Deutsche Bank Natl. Trust Co. v Brathwaite, 2021 NY Slip Op 04659, Second Dept 8-11-21

CRIMINAL LAW, PROSECUTORIAL MISCONDUCT.

THE PROSECUTOR'S REMARKS REQUIRED REVERSAL AND A NEW TRIAL ON ONE COUNT (SECOND DEPT).

The Second Department reversed defendant's conviction on one count (attempted assault), in the interest of justice (i.e. the issue was not preserved), based upon prosecutorial misconduct:

The prosecutor made a number of improper comments during her summation by improperly vouching for the credibility of the People's witnesses, interjecting sympathy, improperly advising the jurors on the law, and making herself an unsworn witness … .For example, when discussing the charge of attempted assault in the first degree, the prosecutor attempted to explain why no shell casings were recovered by informing the jurors that "unfortunately [the Evidence Crime Team] confine[d] themselves to where the crime scene tape was," although no such evidence exists in the record. … [T]he prosecutor referred to testimony that had been stricken … when she told the jury that … the defendant could have shot one of the witnesses. The

prosecutor also informed the jury that the voice of that same witness could be heard screaming on an audio recording of a call to the 911 emergency number. The prosecutor also twice erroneously advised the jury that its credibility determination should be based on, among other things, "what [the jurors] felt" … , and, when discussing the credibility of the prosecution's witnesses, instructed the jury that the criminal history of one of the prosecution's witnesses was not relevant to the question of that witness's credibility. People v Veeney, 2021 NY Slip Op 04673, Second Dept 8-11-21

CRIMINAL LAW, SECOND VIOLENT FELONY OFFENDER STATUS, FOREIGN CONVICTIONS.

BECAUSE SOME OF THE ACTS CRIMINALIZED IN THE FLORIDA STATUTE CONSTITUTE NEW YORK VIOLENT FELONIES AND SOME DO NOT, THE FLORIDA ACCUSATORY INSTRUMENT MUST BE CONSULTED TO DETERMINE THE PRECISE ACTS INVOLVED; THE SECOND VIOLENT FELONY OFFENDER ADJUDICATION WAS VACATED AND THE MATTER WAS SENT BACK FOR A HEARING (SECOND DEPT).

The Second Department sent the matter back to County Court for a hearing to determine whether a Florida conviction supported sentencing defendant as a second violent felony offender:

The Florida robbery statute under which the defendant was convicted … criminalizes several different acts, some of which, if committed in New York, would constitute a violent felony pursuant to Penal Law § 160.15 or § 160.10, and some of which would not. Further, the Florida statute under which the defendant was convicted of possession of a weapon by a felon … does not set forth elements that are equivalent to a violent felony in New York (see Penal Law § 70.02[1]). Under such circumstances, resort to the Florida accusatory instrument, among other things, would be needed to ascertain the particular act or acts underlying the defendant's convictions for robbery and possession of a weapon by a felon in Florida to determine whether the underlying acts were equivalent to a violent felony in New York … . People v Jamison, 2021 NY Slip Op 04668, Second Dept 8-11-21

FAMILY LAW, ABUSE, NEGLECT, CIVIL PROCEDURE.

FATHER ACKNOWLEDGED IMPREGNATING THE OLDEST CHILD; SUMMARY JUDGMENT ON THE ABUSE AND NEGLECT ALLEGATIONS AGAINST FATHER WAS PROPER; HOWEVER THERE WERE QUESTIONS OF FACT ABOUT WHEN MOTHER LEARNED OF THE PREGNANCY AND WHETHER SHE KNEW WHO THE FATHER WAS; SUMMARY JUDGMENT ON THE ABUSE AND NEGLECT ALLEGATIONS AGAINST MOTHER SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing (modifying) Family Court, determined summary judgment on the abuse and neglect allegations against father was properly granted, but summary judgment on the abuse and neglect allegations against mother should not have been granted. Father acknowledged he impregnated the oldest child (who was eleven at the time of the birth). But there were questions of fact about whether mother knew who the father was and whether she know the child was pregnant and therefore in need of medical care:

Although it is a drastic procedural device rarely used in Family Court proceedings, Family Court may grant summary judgment in an abuse and neglect proceeding if no triable issue of fact exists … . On a motion for summary judgment, the moving party bears the burden of establishing its prima facie entitlement to judgment as a matter of law … . If this burden is met, the burden shifts to the party opposing the motion to demonstrate the existence of a material issue of fact … . In resolving a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party … .

* * * Viewing the evidence in the light most favorable to the mother and according her the benefit of every favorable inference, we cannot conclude as a matter of law that the mother knew or should have known of the father's sexual abuse and impregnation of the oldest child or that the mother fostered or allowed the children to live in a sexually charged household.

* * * Although the mother provided some testimony as to when she learned of the pregnancy,[FN9] her testimony changed during the course of the lengthy hearing and a determination as to which, if any, of her accounts was credible is inappropriate on a motion for summary judgment … . Matter of Kai G. (Amanda G.), 2021 NY Slip Op 04682, Third Dept 8-12-21

FORECLOSURE, DEFAULT, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

THE BANK'S EVIDENCE OF DEFENDANT'S DEFAULT AND COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 AND THE MORTGAGE WAS INSUFFICIENT (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff bank did not present sufficient evidence of defendant's default or the bank's compliance the the notice requirements of the mortgage and RPAPL 1304:

… [Plaintiff's representative] did not attest that he was personally familiar with the record-keeping practices and procedures of the plaintiff or those of the plaintiff's predecessor in interest, or that the records generated by the plaintiff's predecessor in interest were incorporated into the plaintiff's own records or routinely relied upon in its business (see CPLR 4518[a] …), and failed to attach any business records of the plaintiff or its predecessor in interest to his affidavit ,,, . Moreover, to the extent that the …. employee's purported knowledge of [defendant's] default was based upon his review of unidentified business records … , his affidavit constituted inadmissible hearsay and lacked probative value … . …

The plaintiff failed to submit an affidavit of service or any proof of mailing by the post office demonstrating that it properly served [defendant] pursuant to the terms of RPAPL 1304 … . The … employee's affidavit was insufficient to establish that the notice was sent to [defendant] in the manner required by RPAPL 1304, as the employee did not provide evidence of the plaintiff's standard office mailing procedure and provided no evidence of the actual mailing … . Bank of N.Y. Mellon v DeLoney, 2021 NY Slip Op 04655, Second Dept 8-11-21

FORECLOSURE, HEARSAY.

THE LOAN SERVICER'S AFFIDAVIT IN THIS FORECLOSURE ACTION LAID A PROPER FOUNDATION FOR THE BUSINESS RECORDS DESCRIBED IN IT, BUT THE RECORDS THEMSELVES WERE NOT ATTACHED, RENDERING THE AFFIDAVIT INADMISSIBLE HEARSAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's representative in this foreclosure action demonstrated in her affidavit that she was familiar with the relevant business records, but did not attach the records. Therefor the affidavit was hearsay:

… [T]he plaintiff submitted … the affidavit of Denise Dickman, … the plaintiff's loan servicer, who averred that she was familiar with the business records maintained … for the purpose of servicing mortgage loans for the plaintiff and that she had personal knowledge of the manner in which those business records were created. Dickman further averred that the satisfaction of mortgage was intended to be recorded against the second mortgage, under which the defendant had defaulted and which [the bank] had "charged off as uncollectable." However, "[d]ue to a clerical error, a loan number was not included with the processing request for the charge off," and, consequently, a satisfaction of mortgage was "prepared, executed and filed in error" … .

Since Dickman attested that she was familiar with [the bank's] record-keeping practices and procedures, her affidavit laid a proper foundation for the admission of the business records on which she relied in asserting that the satisfaction of mortgage was erroneously filed due to a clerical error … . However, Dickman's assertions as to the contents of those records were inadmissible since the records themselves were not submitted with her affidavit … . U.S. Bank N.A. v Kandra, 2021 NY Slip Op 04679, Second Dept 8-11-21

FORECLOSURE, USURY.

DEFENDANT IN THIS FORECLOSURE ACTION UNSUCCESSFULLY RAISED USURY AS AN AFFIRMATIVE DEFENSE; DEFENDANT ARGUED THE BROKER'S COMMISSION, TITLE INSURANCE COST AND ATTORNEY'S FEE CONSTITUTED A COVER FOR USURY (SECOND DEPT).

The Second Department determined the broker's commission, title insurance and attorney's in connection with defendant's (Chandler's) mortgage were not a cover for usury. Chandler had raised usury as an affirmative defense to foreclosure:

General Obligations Law § 5-501(2) provides that "[n]o person or corporation shall, directly or indirectly, charge, take or receive any money, goods or things in action as interest on the loan or forbearance of any money, goods or things in action at a rate exceeding the [maximum permissible interest rate]." In New York, the civil usury statute provides that "[t]he maximum interest rate permissible on a loan is 16% per annum, and any interest rate in excess of that amount is usurious" … . "A usurious contract is void and relieves the borrower of the obligation to repay principal and interest thereon" … . There is a strong presumption against a finding of usury, which must be established by clear and convincing evidence … . …

Chandler claimed that three charges, a $14,000 mortgage broker's commission, a title insurance charge of $7,212.50, and a $1,000 fee paid to her attorney at the closing, were a cover for usury. "[W]hether a commission is a cover for usury is a factual issue which must be demonstrated by clear and convincing evidence" … . If itemized in writing to the borrower, reasonable fees, charges and costs for, among other things, title insurance and legal services are not considered interest on a loan secured by a one- or two-family owner-occupied residence Notably, "[a]n imprecise … . disclosure . . . constitutes a bona fide error of fact which is insufficient to establish the requisite usurious intent" … . Zanfini v Chandler, 2021 NY Slip Op 04681, Second Dept 8-11-21

LABOR LAW-CONSTRUCTION LAW, ALTERING.

THE INSTALLATION OF LARGE INDVIDUAL LETTERS FOR A SIGN ON THE FRONT SOFFIT OF A BUILDING CONSTITUTED "ALTERING" THE BUILDING TO WHICH LABOR LAW 240(1) AND 241(6) APPLY; BECAUSE THE DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE ACTUAL NOTICE OF THE DANGEROUS CONDITION OF THE SOFFIT (WHICH COLLAPSED), THE LABOR LAW 200 CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Labor Law 240 (1), 241 (6) and 200 causes of action should not have been dismissed. Plaintiff was hired to install a sign made up of large individual letters on the front soffit of a business. Plaintiff used a ladder to climb inside the soffit through an access door to attach washers and nuts to bolts holding the letter which were passed through drilled holes by a co-worker. The floor of the soffit gave way and plaintiff fell 15 feet to the concrete below. Installing the sign constituted "altering" the building such that Labor Law 240 (1) and 241(6) applied. Also the Labor Law 200 cause of action should have survived because defendant did not demonstrate it lacked actual notice of the condition of the soffit:

… "[A]ltering," within the meaning of Labor Law § 240(1) [and 241 (6)] , involves "making a significant physical change to the configuration or composition of the building or structure" … . Here, the evidence … failed to establish … that the injured plaintiff was not engaged in "altering" the building at the time of the accident … . …

… "[W]here a plaintiff's injuries stem … from a dangerous condition on the premises, a landowner may be liable under Labor Law § 200 if it 'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition'" … . …

… [Defendant] failed to establish … that it lacked actual notice of the allegedly defective condition in the soffit … . Alberici v Gold Medal Gymnastics, 2021 NY Slip Op 04651, Second Dept 8-11-21

MUNICIPAL LAW, CIVIL PROCEDURE, COVID-19.

THE NYC COMPTROLLER'S SUBPOENAS FOR COVID-19-PLANNING-RELATED COMMUNICATIONS BETWEEN MAYOR DE BLASIO AND THE FIRST DEPUTY MAYOR WERE PROPERLY QUASHED BY SUPREME COURT (FIRST DEPT).

The First Department determined Supreme Court properly quashed subpoenas issued by the NYC Comptroller seeking communications between Mayor de Blasio and First Deputy Mayor Fuleihan concerning the city's COVID-19 pandemic planning. The First Department further held Supreme Court properly refused to quash other subpoenas issue by the Comptroller and properly ordered the depositions of two City witnesses without limitation of the scope of questioning:

In May 2020, in the midst of the ongoing COVID-19 public health emergency, Comptroller Scott Stringer commenced a [NYC Charter] Section 93(b) investigation of the City's preparation for, planning for, and response to the pandemic to identify how those efforts impacted the City, its finances, residents and businesses. In connection with the investigation, the Comptroller issued a "request for information" to the City, which it sent to Dean Fuleihan, the City's First Deputy Mayor, seeking information and communications related to COVID-19 … .

… [T]he court properly applied the public interest privilege to quash the document requests served on the Mayor and First Deputy Mayor. Generally, the public-interest privilege is a common-law rule that "attaches to confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged" because "the public interest would be harmed if the material were to lose its cloak of confidentiality" … . Matter of Comptroller of the City of N.Y. v City of New York, 2021 NY Slip Op 04685, First Dept 8-12-21

REAL PROPERTY LAW, NUISANCE, NEGLIGENCE.

PLAINTIFF ALLEGED STORM WATER RUNOFF FROM DEFENDANT'S PROPERTY FLOODED PLAINTIFF'S PROPERTY; THE NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED AS DUPLICATIVE OF THE NUISANCE CAUSE OF ACTION BECAUSE NUISANCE MAY INVOLVE INTENTIONAL CONDUCT (THIRD DEPT).

The Third Department, in a decision too detailed to fairly summarize here, determined Supreme Court properly denied summary judgment in this dispute about responsibility for storm water runoff which allegedly flooded plaintiff's property. Supreme Court, however, erred in dismissing plaintiff's negligence cause of action as duplicative of the nuisance cause of action:

The effect of defendant's actions was to eliminate what was described as a retention pond on the cemetery land, causing the water to back up onto plaintiff's property, which, prior to the placement of fill, had never experienced flooding. Since the fill was placed, plaintiff's property flooded on four occasions, and plaintiff, after the first flood in February 2009, placed defendant on notice of the flood and the resulting damages and asked for its assistance to remedy the problem. Defendant denied responsibility for the flooding and took no remedial efforts to prevent further flooding. Although the causes of action for negligence and private nuisance arise out of the same undisputed facts, it cannot be said that the private nuisance claim arises solely out of the negligence claim. To the contrary, the facts as alleged in plaintiff's complaint and bills of particulars demonstrate a viable theory of private nuisance based upon intentional conduct, i.e., that defendant eventually knew or should have known that its actions in placing the fill caused substantial interference and nevertheless continued it … . WFE Ventures, Inc. v GBD Lake Placid, LLC, 2021 NY Slip Op 04683, Third Dept 8-12-21

SLIP AND FALL, JUDGES, ATTORNEYS.

SUPREME COURT SHOULD NOT HAVE DISMISSED THE COMPLAINT IN THIS SLIP AND FALL CASE ON THE GROUND THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WAS UNOPPOSED; PLAINTIFF'S COUNSEL WAS UNDER THE IMPRESSION THE PARTIES STIPULATED TO AN ADJOURNED DATE; LEAVE TO APPEAL GRANTED IN THE INTERST OF JUSTICE; SUMMARY JUDGMENT DENIED ON THE MERITS (FIRST DEPT).

The First Department, reversing Supreme Court, determined the building owner's (Findlay's) motion for summary judgment in this wet-floor slip and fall case should not have been granted. Supreme Court had treated the motion as unopposed. However, plaintiff's counsel was under the impression the parties had stipulated to an adjourned date. Leave to appeal was granted in the interest of justice. On the merits, plaintiff raised a question of fact about the adequacy of the "wet floor" warning:

[Supreme Court's] order was not made upon notice and is not appealable as of right (CPLR 5701[a]). However, this Court is authorized to deem a notice of appeal a request for leave to appeal and to grant such leave for a determination on the merits in the interest of justice (CPLR 5701[c] …). Given the facts of this case, this Court grants plaintiff leave to appeal in the interest of justice. Relying on CPLR 2214 and 2004, the motion court dismissed the complaint because plaintiff's counsel did not offer a valid explanation for his late filing. However, counsel filed his opposition pursuant to what he thought was a valid stipulation. …

Given the T-shaped nature of the hallway in this case, there are issues of fact as to whether the first warning sign was adequate, especially since the floor in that area was dry. Indeed, "[t]he mere placement of a "wet floor warning sign does not automatically absolve a defendant of negligence" … . We also note that this housing development housed primarily elderly and handicapped individuals. Zubillaga v Findlay Teller Hous. Dev. Fund Corp., 2021 NY Slip Op 04687, First Dept 8-12-21

SLIP AND FALL, NEGLIGENCE, CONTRACT LAW.

BY THE TERMS OF THE MANAGING AGENT'S CONTRACT WITH THE COOPERATIVE, THE MANAGING AGENT DID NOT FULLY ASSUME THE DUTY TO MAINTAIN THE COOPERATIVE PREMISES SUCH THAT THE AGENT WOULD BE LIABLE FOR PLAINTIFF'S SLIP AND FALL ON THE PREMISES; THE MANAGING AGENT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined the defendant managing agent was not liable based on the terms of managing agent's contract with the cooperative where plaintiff fell:

Where … a managing agent is accused of nonfeasance which causes injury to a third party, it is subject to liability only where it has complete and exclusive control of the management and operation of the property in question … . A managing agent is not in complete and exclusive control of the premises where the owner has reserved to itself a certain amount of control in the written agreement … . …

… [T]he terms of the management agreement … established (1) that the resident manager, who was an employee of the cooperative, was responsible for supervising all personnel, including the maintenance staff, (2) that all personnel were employees of the cooperative, and (3) that all maintenance, repairs, and inspections were performed by the resident manger or members of the maintenance staff. Cacciuottolo v Brown Harris Stevens Mgt., 2021 NY Slip Op 04656, Second Dept 8-11-21

TRAFFIC ACCIDENTS, MUNICIPAL LAW.

THE CITY DID NOT DEMONSTRATE THE ABSENCE OF A LEFT TURN TRAFFIC SIGNAL WAS BASED ON A STUDY FINDING THE SIGNAL WAS NOT WARRANTED; THEREFORE THE CITY DID NOT DEMONSTRATE IT WAS ENTITLED TO IMMUNITY IN THIS HIGHWAY-PLANNING ACTION BY A PEDESTRIAN WHO WAS STRUCK BY A VEHICLE MAKING A LEFT TURN (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the city's motion for summary judgment in this pedestrian-vehicle accident case should not have been different. Plaintiff was crossing the street in the crosswalk with the pedestrian light in her favor when she was struck by a car making a left turn. There was a left turn lane but no left turn traffic signal. The city did not demonstrate the design of the traffic light was based upon a study which considered whether a left turn signal was warranted:

… [I]n the field of traffic design engineering, the State is accorded a qualified immunity from liability arising out of a highway planning decision" … . Under the doctrine of qualified immunity, a governmental entity may not be held liable for a highway safety planning decision unless its study of a traffic condition is plainly inadequate, or there is no reasonable basis for its traffic plan … . Immunity will apply only "where a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury" … .

Here, the City failed to establish that the design of the subject traffic signal, including the determination that no left-turn signal was warranted, was based on a study which entertained and passed on the very same question of risk that the plaintiff would put to a jury … . Rosado v City of New Rochelle, 2021 NY Slip Op 04675, Second Dept 8-11-21