NEW YORK APPELLATE DIGEST, LLC

Weekly Newsletter
September 13 - 17, 2021

An Organized Compilation of the Summaries of Selected Decisions Released by Our New York State Appellate Courts the Week of September 13 – 17, 2021, and Posted on the New York Appellate Digest Website on Monday September 20, 2021. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Right Click on the Citations to Keep Your Place in the Newsletter.

Contents

Table of Contents

ATTORNEY'S FEES, CONTRACT LAW.

NEITHER PARTY WAS THE "PREVAILING PARTY" IN THIS DISPUTE OVER THE CARE OF THE PARTIES' INCAPACITATED FATHER; THEREFORE NEITHER PARTY WAS ENTITLED TO ATTORNEY'S FEES PURSUANT TO THE SETTLEMENT AGREEMENT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined neither party in this dispute over care for an incapacitated person (the parties' father) was a "prevailing party" and therefore neither of the two sons, Michael and Stephen, was entitled to an award of attorney's fees:

Following an evidentiary hearing, … the Supreme Court denied Michael's request to remove Stephen as Milton's [father's] attorney-in-fact and health care agent. However, the court determined that Stephen breached the settlement agreement by refusing to mediate. The court also granted that branch of Michael's motion which was for an award of attorney's fees pursuant to the settlement agreement's fee shifting provision. …

"Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" … . "'[O]nly a prevailing party is entitled to recover an attorney's fee' and '[t]o be considered a prevailing party, a party must be successful with respect to the central relief sought'" … . "Such a determination requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope" … . Matter of Milton R., 2021 NY Slip Op 04975, Second Dept 9-15-21

CIVIL PROCEDURE, COLLATERAL ESTOPPEL, WORKERS' COMPENSATION, LABOR LAW-CONSTRUCTION LAW.

THE LABOR-LAW CONSTRUCTION-ACCIDENT ACTION WAS PRECLUDED BY THE RESULT OF THE PRIOR WORKERS' COMPENSATION HEARING UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL; THE MOTION TO AMEND THE ANSWER TO ADD THE COLLATERAL ESTOPPEL DEFENSE WAS PROPERLY GRANTED, EVEN THOUGH THE MOTION WAS MADE AFTER THE NOTE OF ISSUE WAS FILED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, determined the Labor Law 240(1), 241(6) and 200 action was precluded by the doctrine of collateral estoppel based upon the result of a Workers' Compensation hearing. Plaintiff alleged a hoist at a construction site malfunctioned causing knee injuries. Plaintiff was represented by an attorney at the Workers' Compensation hearing and witnesses were cross-examined. The Administrative Law Judge (ALJ) concluded that the incident (hoist malfunction) never occurred. In addition, the Second Department held that the motion to amend the answer to add the collateral estoppel defense, made after the note of issue was filed, was properly granted. Plaintiff could not have been surprised by the defense and suffered no prejudice from the late amendment:

Determinations rendered by quasi-judicial administrative agencies may qualify for collateral estoppel effect so long as the requirements of the doctrine [identity of issues and a full and fair opportunity to contest the controlling decision] are satisfied. Determinations of the Workers' Compensation Board are potentially within the scope of the doctrine … . * * *

… [T]he defendants met their burden of establishing, prima facie, their entitlement to judgment as a matter of law on the ground that the plaintiff's action was barred by the doctrine of collateral estoppel. The ALJ's findings, as affirmed by the Workers' Compensation Board, established as a matter of fact that the accident claimed by the plaintiff did not occur, or did not occur in the described manner as would cause injury. That finding is material and, in fact, pivotal, to the core viability of any personal injury action that the plaintiff could pursue in a court at law regarding

the same incident … . Lennon v 56th & Park(NY) Owner, LLC, 2021 NY Slip Op 04972, Second Dept 9-15-21

CIVIL PROCEDURE.

GENERALLY, TO VACATE A JUDGMENT BY CONFESSION, A PLENARY ACTION, NOT A MOTION TO VACATE, MUST BE BROUGHT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, in order to vacate a judgment by confession, a plenary action must be commenced. Here the motion to vacate was not the proper vehicle:

"Generally, a person seeking to vacate a judgment entered upon the filing of an affidavit of confession of judgment must commence a separate plenary action for that relief" … . Here, the grounds for vacatur relied upon by the defendant do not fall within an exception to that general rule … . Accordingly, the Supreme Court should have denied the defendant's motion without prejudice to his right to commence a plenary action to vacate the judgment by confession. Funding Metrics, LLC v D & V Hospitality, Inc., 2021 NY Slip Op 04964, Second Dept 9-15-21

CRIMINAL LAW, APPEALS, ATTORNEYS.

APPELLATE COUNSEL SHOULD HAVE ARGUED THAT COUNTY COURT FAILED TO CONSIDER A YOUTHFUL OFFENDER ADJUDICATION; WRIT OF ERROR CORAM NOBIS GRANTED AND MATTER REMITTED (SECOND DEPT).

The Second Department granted the writ of error coram nobis and remitted the matter. Appellate counsel should have raised the argument that County Court failed to consider whether defendant should be adjudicated a youthful offender:

… [W]e grant the defendant's application for a writ of error coram nobis, based on former appellate counsel's failure to contend on appeal that the County Court failed

to determine whether the defendant should be afforded youthful offender status. As held by the Court of Appeals in People v Rudolph (21 NY3d 497), CPL 720.20(1) requires "that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain"… . Here, the record does not demonstrate that the court considered whether to adjudicate the defendant a youthful offender, even though the defendant was eligible … . Although we acknowledge that the Court of Appeals decided Rudolph only shortly before former appellate counsel filed the brief on the appeal, because the holding in Rudolph compels vacatur of the sentence, the standard of meaningful representation required former appellate counsel to argue that, pursuant to Rudolph, the sentence must be vacated and the matter remitted for determination of the defendant's youthful offender status … . People v Slide, 2021 NY Slip Op 04982, Second Dept 9-15-21

CRIMINAL LAW.

GENERAL CRITERIA FOR DENYING, WITHOUT HOLDING A HEARING, A MOTION TO VACATE A CONVICTION ON INEFFECTIVE-ASSISTANCE GROUNDS (CT APP).

The Court of Appeals, without discussing the facts, laid out the criteria for denying a motion to vacate a conviction on ineffective-assistance grounds without holding a hearing:

… [A] court may deny a CPL 440.10 motion without conducting a hearing if "[t]he motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts" … . Here, County Court did not abuse its discretion in denying defendant's CPL 440.10 motion without a hearing because, under the circumstances presented, defendant failed to sufficiently allege "'a reasonable probability that, but for counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial'" … . Moreover, defendant failed to otherwise "show that the nonrecord facts sought to be established . . . would entitle him to relief" … . People v Dogan, 2021 NY Slip Op 04956, CtApp 9-14-21

FAMILY LAW, FRAUD.

HUSBAND DID NOT DEMONSTRATE HIS WIFE FRAUDULENTLY INDUCED HIM TO MARRY HER TO OBTAIN UNITED STATES CITIZENSHIP; THE MARRIAGE SHOULD NOT HAVE BEEN ANNULLED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the husband did not demonstrate he was fraudulently induced to marry his wife. Husband argued his wife, who was from the Philippines, induced him to marry her in order to become a United States citizen. Supreme Court annulled the marriage. The Third Department held the husband did not meet his burden of proof:

Where the consent of either spouse to a marriage was obtained by fraud, the marriage is voidable by way of an annulment action (see Domestic Relations Law §§ 7 [4]; 140 [e] …). To obtain an annulment, the plaintiff spouse must prove that the defendant spouse knowingly made a material false representation to the plaintiff spouse with the intent of inducing the plaintiff spouse's consent to marriage, that the misrepresentation was of such a nature as to deceive an ordinarily prudent person, that the plaintiff spouse justifiably relied on the misrepresentation in consenting to marriage and that, once aware of the false representation, cohabitation ceased … . …

The husband's case of fraud in the inducement was premised upon his claim that the wife induced him to marry through false representations of love and affection for the sole purpose of obtaining an immigration benefit. The husband, however, failed to prove that claim at trial, as his proof fell far short of demonstrating a fraudulent premarital intent on the part of the wife. The husband's proof primarily consisted of testimony establishing premarital and marital discord between the parties. Although the husband sought to attribute that discord to a fraudulent premarital intent, he ultimately failed to demonstrate "that the marital break was due to any cause other than the general discontent and incompatibility of the parties" … . Indeed, the husband's own proof demonstrated that, during their marital spats, the wife indicated her desire to leave the marriage and return to her family and friends in the Philippines. The fact that she remained in the United States after the parties ceased

cohabitating is insufficient to demonstrate that, prior to the marriage, the wife had the intent to induce the husband to marry with the sole objective of obtaining an immigration benefit. In determining otherwise, Supreme Court erred by not holding the husband to his burden of proof, relying too heavily upon the wife's belated filing of a family offense petition in another county and taking a negative inference against the wife for purportedly exploring relief under the Violence Against Women Act. Travis A. v Vilma B., 2021 NY Slip Op 04996, Third Dept 9-16-21

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

THE AFFIDAVITS SUBMITTED TO DEMONSTRATE THE FAIR MARKET VALUE OF THE FORECLOSED PROPERTY IN THIS ACTION SEEKING A DEFICIENCY JUDGMENT PURSUANT TO RPAPL 1371 (2) WERE DEFECIENT; SUPREME COURT PROPERLY ORDERED A HEARING TO ESTABLISH THE FAIR MARKET VALUE (SECOND DEPT).

The Second Department in this foreclosure proceeding seeking a deficiency judgment determined Supreme Court properly ordered a hearing to establish the fair market value of the property. The submitted affidavits were not sufficient:

"RPAPL 1371(2) permits the mortgagee in a mortgage foreclosure action to recover a deficiency judgment for the difference between the amount of indebtedness on the mortgage and either the auction price at the foreclosure sale or the fair market value of the property, whichever is higher" … When a lender moves to secure a deficiency judgment against a borrower, "the court . . . shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof" … . "It is the lender who bears the initial burden of demonstrating, prima facie, the property's fair market value as of the date of the auction sale"… . "RPAPL 1371 does not require the court to hold an evidentiary hearing; however, where 'a triable issue as to the reasonable market value is presented, that issue should not be decided upon affidavits, but by

the court or a referee, so that the witnesses may be subject to observation and cross-examination'" … . …

The appraisal … was not certified, nor was it accompanied by an affidavit of the appraiser. Moreover, the appraisal stated that the value indicated by the income approach was in the amount of $450,000, while the value indicated by the sales comparison approach was in the amount of $480,000. There was no explanation as to why the Supreme Court should accept the value based on the income approach as opposed to the sales comparison approach. U.S. Bank, N.A. v 199-02 Linden Blvd. Realty, LLC, 2021 NY Slip Op 04991, Second Dept 8-15-21

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

THE BANK IN THIS FORECLOSURE ACTION WAS NOT REQUIRED TO MEET THE 90-DAY-NOTICE REQUIREMENT OF RPAPL 1304 BECAUSE THE DEFENDANT HAD MOVED FROM THE RESIDENCE; HOWEVER THE BANK WAS STILL REQUIRED BY RPAPL 1304 TO PROVIDE NOTICE OF THE FORECLOSURE TO THE DEFENDANT; THE PROOF THAT NOTICE WAS MAILED WAS INSUFFICIENT (SECOND DEPT).

The Second Department determined the loan in question in this foreclosure proceeding was a "home loan" within the meaning of RPAPL 1304 and therefore the notice requirements of RPAPL 13O4 applied. The bank argued the loan was not a "home loan" because the defendant no longer lived on the property. The Second Department held that, because the defendant had moved, the 90-day-notice required by RPAPL 1304 did not apply, but the bank was still obligated to notify the defendants of the foreclosure action. Because the bank did not submit sufficient proof of compliance with the notice provisions of RPAPL 1304, the bank's motion for summary judgment was properly denied:

… [W]hile finding, pursuant to RPAPL 1304(3), that "[g]iven that Defendant no longer occupies the residence as his principal dwelling place, the ninety-day period specified in the notice is inapplicable," the Supreme Court properly concluded that "Defendant's loan qualified as a 'home loan' under RPAPL § 1304(5) due to the fact

that the home was Defendant's primary residence from the time of the loan until he was transferred to California in 2011," and that, "[t]herefore, Plaintiff needed to serve statutory notice pursuant to RPAPL § 1304 on Defendant by first class mail and certified mail." …

To establish its compliance with the notice requirements of RPAPL 1304, the plaintiff submitted the affidavit of its employee, Takesha Brown, a document execution specialist. Although Brown stated in her affidavit that the RPAPL 1304 notices were mailed by certified and regular first-class mail, she did not attest to having personal knowledge of the mailing, and the plaintiff failed to attach, as exhibits to the motion, any documents to prove that the notices were actually mailed to the defendant … . In addition, the plaintiff failed to provide "proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure" … . Nationstar Mtge., LLC v Jong Sim, 2021 NY Slip Op 04979, Second Dept 9-15-21

LABOR LAW-CONSTRUCTION LAW.

THE FACT THAT THE LADDER SLID OR SHIFTED AND FELL WARRANTED SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION; PLAINTIFF DID NOT NEED TO DEMONSTRATE THE LADDER WAS DEFECTIVE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action in this ladder-fall case. Plaintiff alleged the ladder slid or shifted and then fell. In that circumstance plaintiff does not have to demonstrate the ladder was defective and any comparative negligence on plaintiff's part should not be considered:

Defendants argue that the statutory requirement was not met because plaintiff testified that there was no defect in the extension ladder and that it felt secure. Although defendants have produced evidence that the ladder may not have been defective, the adequacy of the ladder is not a question of fact when it "slips or otherwise fails to perform its function of supporting the worker" … . …

Although defendants cite to numerous actions on the part of plaintiff in support of this contention, including that plaintiff did not (1) use an alternative safety device or scaffold to install the guidewires, (2) have supervision or ask for assistance when using the ladder or (3) clear the snow upon which the feet of the ladder were placed, these arguments merely raise a question as to plaintiff's comparative negligence, which will not relieve defendants from liability … . Begeal v Jackson, 2021 NY Slip Op 05000, Third Dept 9-16-21

LIEN LAW, CIVIL PROCEDURE.

GARAGEKEEPER'S LIEN DECLARED NULL AND VOID UNDER THE DOCTRINE OF LACHES (THIRD DEPT).

The Third Department determined that the garagekeeper's lien action was properly declared null and void under the doctrine of laches. The respondent did not start the Lien Law action for six months, during which storage charges of $55-a-day were accruing:

"A garagekeeper's lien is authorized by Lien Law § 184 (1) and the purpose of this statute is to provide the repair shop with security for the labor and material it expends which enhance the value of the vehicle" … . "The statute is in derogation of common law and thus is strictly construed" … . "Laches is defined as an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party" … . We are unpersuaded by respondent's claim that the doctrine of laches is inapplicable to the circumstances of this case as the claim is purely statutory and does not lie in equity. Petitioner, by posting a $15,000 bond as collateral for respondent's claim, has attempted in good faith to discharge the lien. We note that this action to enforce the lien is equitable, not legal, in nature … . … [I]t is clear from the record that petitioner was unaware of the existence of the lien until more than six months after storage charges began to accrue, and it was prejudiced by respondent's assertion of such claim after such a prolonged period of delay. "It is well settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis

for asserting the defense of laches" … . Matter of Santander Consumer USA, Inc. v Steve Jayz Automotive Inc., 2021 NY Slip Op 04998, Third Dept 9-16-21

MUNICIPAL LAW, NEGLIGENCE.

PLAINTIFF FIREFIGHTER ALLEGED DEBRIS ON STAIRS IN DEFENDANT'S HOME CAUSED HIM TO FALL WHILE FIGHTING A FIRE; THE DEBRIS DID NOT VIOLATE THE NYC ADMINISTRATIVE CODE SO THE GENERAL MUNICIPAL LAW 205-A CAUSE OF ACTION WAS PROPERLY DISMISSED; HOWEVER THE COMMON LAW NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the plaintiff firefighter's General Municipal Law 205-a action was properly dismissed, but the common law negligence action against the owner of the home where plaintiff fell while fighting a fire should not have been dismissed. Plaintiff alleged debris on a stairway caused the fall. The General Municipal Law 205-a cause of action was dismissed because the debris was not a structural defect and did not therefore violate the NYC Administrative Code:

… Supreme Court properly granted that branch of the defendant's motion which was for summary judgment dismissing so much of the cause of action pursuant to General Municipal Law § 205-a as was predicated on violations of Administrative Code of the City of New York §§ 28-301.1 and 29-107.5 i… . The defendant demonstrated, prima facie, that the dangerous condition which allegedly caused the plaintiff's injuries "did not constitute a specific structural or design defect giving rise to liability under the Administrative Code" … . …

… Supreme Court should not have granted that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging common-law negligence insofar as asserted against him. Contrary to the defendant's contention, the firefighter's rule does not bar this cause of action under the circumstances of this case … . The defendant failed to establish that he lacked constructive notice of the debris on the stairway, including a box, which allegedly

caused the plaintiff to fall … . Pomilla v Bangiyev, 2021 NY Slip Op 04984, Second Dept 9-15-21

MUNICIPAL LAW, NEGLIGENCE.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN THIS ACTION AGAINST THE TOWN; TOWN POLICE HAD CONFISCATED PLAINTIFF'S DECEDENT'S HUSBAND'S GUN AFTER SHE TOLD THE POLICE HE HAD ASSAULTED HER; THE TOWN SUBSEQUENTLY RETURNED THE GUN TO HER HUSBAND AFTER LEARNING HE WAS A RETIRED POLICE OFFICER; HER HUSBAND THEN SHOT AND KILLED PLAINTIFF'S DECEDENT AND TOOK HIS OWN LIFE (SECOND DEPT).

The Second Department determined the town's motion for summary judgment was properly denied. Plaintiff's decedent had called the town police and told them her husband had assaulted her and that she feared for her life. The town police confiscated her husband's gun. The town returned the gun upon learning the husband was a retired police officer, even though he was not licensed to possess a gun in New York. He shot and killed plaintiff's decedent and then took his own life:

Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general … . Here … the return of the firearm … was not a discretionary function. [Decedent's husband] did not, … produce a license to possess the gun in the State of New York, and did not produce the proper identification under the Law Enforcement Officers Safety Act … . * * *

… [T]he evidence demonstrated the existence of triable issues of fact as to whether the Town, through its police officers, voluntarily assumed a duty on behalf of the decedent when they confiscated [the] gun in response to the decedent's alleged report that [her husband] had physically assaulted her.

… The Town was not entitled to summary judgment … on the ground that [decedent"s husband's] shooting of the decedent was an intervening act that severed the causal connection between the Town's alleged negligence … and the injuries

and death to the decedent … . An intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent … . Santaiti v Town of Ramapo, 2021 NY Slip Op 04986, Second Dept 9-15-21

ZONING, MUNICIPAL LAW, CIVIL PROCEDURE.

THE FINDING BY THE BOARD OF ZONING APPEALS WAS NEVER FILED AS REQUIRED BY THE GENERAL CITY LAW; THEREFORE THE 60-DAY TIME LIMIT FOR CONTESTING THE RULING NEVER STARTED TO RUN (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the 60-day statute of limitation for contesting a ruling of the board of zoning appeals (BZA) never started to run because the ZBA's finding was never filed:

General City Law § 81-a (5) (a) imposes an affirmative duty on administrative officials charged with the enforcement of a local zoning law or ordinance in mandating that "[e]ach order, requirement, decision, interpretation or determination . . . shall be filed. . . within five business days from the day it is rendered, and shall be a public record" … . General City Law § 81-a (5) (b) states that "[a]n appeal shall be taken within [60] days after the filingof any order, requirement, decision, interpretation or determination of the administrative official, by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought" (… see Code of the City of Ithaca § 325-40 [B] [1] [e]). Upon review of the record, it is impossible to ascertain exactly when the Planning Board determined that variances were not necessary. However, it is undisputed that no determination of such finding was ever filed. As General City Law § 81-a (5) (b) plainly provides that the time period for commencing a review proceeding is to be measured from the filing, and there was no filing, the time period for the administrative appeal never began to run … . Matter of Grout v Visum Dev. Group LLC, 2021 NY Slip Op 04997, Third Dept 9-16-21