

# NEW YORK APPELLATE DIGEST, LLC

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Addressing Civil Procedure Released by Our New York State Appellate Courts  
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**APPEALS, FILING AND SERVICE OF NOTICE OF APPEAL.**

**THE NOTICE OF APPEAL WAS TIMELY SERVED BUT WAS NOT TIMELY FILED WITH THE CLERK OF THE COURT; THE 3RD DEPARTMENT DISMISSED THE APPEAL; THE APPELLATE COURT HAS THE DISCRETION TO ALLOW A LATE FILING; MATTER REMITTED (CT APP).**

*Matter of Miller v Annucci, 2021 NY Slip Op 04954, CtApp 9-9-21*

Practice Point: A notice of appeal is filed when it is in the hands of the court clerk, and it is served on the opposition when it is mailed. If the notice of appeal is either timely served but not timely filed, or timely filed but not timely served, the court to which the appeal is taken has the discretion to allow more time to complete the process.

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**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).**

*Lennon v 56th & Park(NY) Owner, LLC, 2021 NY Slip Op 04972, Second Dept 9-15-21*

Practice Point: At least where the Workers' Compensation claimant is represented by counsel and witnesses are cross-examined, the denial of a Workers' Compensation claim may, under the collateral estoppel doctrine, preclude a Labor Law-Construction Law action based on the same facts.

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**FORECLOSURE, DEFAULT JUDGMENTS.**

**PLAINTIFF BANK DID NOT PROVIDE AN ADEQUATE EXCUSE FOR FAILING TO TAKE A TIMELY DEFAULT JUDGMENT; THE FORECLOSURE ACTION WAS ABANDONED (SECOND DEPT).**

*HSBC Bank USA, N.A. v Whaley, 2021 NY Slip Op 05027, Second Dept 9-22-21*

Practice Point: Whether to grant a motion to vacate a default judgment is considered an exercise of discretion. But if a motion to vacate a default judgment is granted based on a flimsy excuse, an appellate court may reverse, finding that the motion court abused its discretion.

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**FORECLOSURE, MOTION TO CONFIRM REFEREE’S REPORT, NOTICE TO PARTY WHICH HAS “FAILED TO APPEAR.”**

**A DEFENDANT IN A FORECLOSURE ACTION WHICH HAS “FAILED TO APPEAR” IS NOT ENTITLED TO NOTICE OF A MOTION TO CONFIRM A REFEREE’S REPORT, NOTWITHSTANDING DICTA IN PRIOR 2ND DEPARTMENT RULINGS; A DETAILED AND COMPREHENSIVE DISCUSSION OF THE NOTICE REQUIREMENTS WHERE A DEFENDANT IN A FORECLOSURE ACTION HAS DEFAULTED (SECOND DEPT).**

*21st Mtge. Corp. v Raghu, 2021 NY Slip Op 05016, Second Dept 9-22-21*

Practice Point: Where a defendant in a foreclosure action has “failed to appear” the defendant is not entitled to notice of a motion to confirm the referee’s report. The motion to confirm is not considered an application for a default judgment, for which notice is required by CPLR 3215(b).

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**FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDING LAW (RPAPL) 1304, PROOF OF MAILING OF NOTICE.**

**PROOF OF MAILING OF THE RPAPL 1304 NOTICE TO THE CORRECT ADDRESS WAS NOT INCLUDED IN THE INITIAL MOTION PAPERS AND THEREFORE WAS NOT PART OF PLAINTIFF’S ATTEMPT TO MAKE OUT A PRIMA FACIE CASE; IN ADDITION, THE PROOF OF MAILING OF THE RPAPL 1304 NOTICE WAS DEFICIENT (SECOND DEPT).**

*Caliber Home Loans, Inc. v Weinstein, 2021 NY Slip Op 05021, Second Dept 9-22-21*

Practice Point: Proof the bank provided notice of the foreclosure action to the borrower(s) pursuant to Real Property Actions and Proceedings Law section 1304 is a condition precedent to the action. If the proof of notice is not included in the original summary judgment papers, the bank has not made out a prima facie case and the omission cannot be fixed by a subsequent submission.

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**JUDGMENT AS A MATTER OF LAW, CPLR 4401.**

**THE MOTION FOR A JUDGMENT AS A MATTER OF LAW (CPLR 4401) FINDING THE NYC HOUSING AUTHORITY LIABLE FOR A BEDBUG INFESTATION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).**

*Aponte v New York City Hous. Auth., 2021 NY Slip Op 05114, Second Dept 9-29-21*

Practice Point: When the trial is over and a party moves for a judgment as a matter of law pursuant to CPLR 4401, the court cannot “weigh the evidence.” The motion cannot be granted if facts are in dispute, if different inferences can be drawn from the facts or if the credibility of witnesses must be assessed. There must be no rational process by which the jury could have reached its verdict.

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**JUDGMENT BY CONFESSION, VACATION OF.**

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

Funding Metrics, LLC v D & V Hospitality, Inc., 2021 NY Slip Op 04964, Second Dept 9-15-21

Practice Point: Although there are exceptions to the rule, generally a plenary action must be brought to vacate a judgment by confession. A motion to vacate will not do it.

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**LABOR LAW-CONSTRUCTION LAW, AMENDMENT OF BILL OF PARTICULARS, INDUSTRIAL CODE PROVISIONS ADDED AFTER THE NOTE OF ISSUED HAS BEEN FILED.**

**SUPREME COURT PROPERLY ALLOWED THE AMENDMENT OF THE BILL OF PARTICULARS AFTER THE NOTE OF ISSUE HAD BEEN FILED; THE AMENDMENT ALLEGED ADDITIONAL VIOLATIONS OF THE INDUSTRIAL CODE IN THIS LABOR LAW 241(6) ACTION (SECOND DEPT).**

Palaguachi v Idlewild 228th St., LLC, 2021 NY Slip Op 05127, Second Dept 9-29-21

Practice Point: A Labor Law 241(6) cause of action is based on the violation of Industrial Code provisions. Where there is merit to the alleged violations, there are no new factual allegations and there is no prejudice to the defendant, the bill of particulars can be amended to include additional violations of the Industrial Code even after the note of issue has been filed.

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**LACHES, LIEN LAW.**

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

Matter of Santander Consumer USA, Inc. v Steve Jayz Automotive Inc., 2021 NY Slip Op 04998, Third Dept 9-16-21

Practice Point: A successful laches defense is not seen too often. Here it was successful where the garage which was charging vehicle-storage fees of \$55-a-day waited six months before starting the Lien-Law proceeding.

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**MUNICIPAL LAW, DEADLINE FOR APPEAL OF ZONING BOARD RULINGS.**

**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).**

Matter of Grout v Visum Dev. Group LLC, 2021 NY Slip Op 04997, Third Dept 9-16-21

Practice Point: If a municipality does not file its zoning determination, the time-limit for appealing it (30 days here) never starts to run.

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