NEW YORK APPELLATE DIGEST, LLC

First Department
Quarterly
July – September 2021

An Organized Compilation of the Summaries of Selected Decisions Released by the First Department July – September, 2021, and Posted on the New York Appellate Digest Website in that Quarter. 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 Quarterly.

Contents

Table of Contents

Table of Contents

CIVIL PROCEDURE, ARTICLE 78, STATUTES 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).

The First Department, reversing Supreme Court, determined the petitioner's Article 78 action should have been dismissed because it was not properly commenced within four months. An attempt to commence the action was timely made, but the petition was returned:

An article 78 proceeding must be commenced within four months of the final determination under review (see CPLR 217[1]). Such a proceeding is commenced when the clerk of the court receives the petition in valid form … . Although petitioners attempted to file the petition in Queens County within four months, they did not do so in a manner which was then authorized (see CPLR 304[b]; 22 NYCRR 202.5-b[a], 202.5-bb[a]). The petition was returned to petitioners, who filed it after the four-month period had passed. The petition was untimely, and the court had no discretion to extend the statute of limitations … . Contrary to petitioners' contention, the deficiency in their initial filings is not subject to correction pursuant to CPLR 2001 so as to render the proceeding timely, as the failure to file the papers required to commence a proceeding constitutes a nonwaivable, jurisdictional defect … . Matter of Heffernan v New York City Mayor's Off. of Hous. Recovery Operations, 2021 NY Slip Op 04276, First Dept 7-8-21

CIVIL PROCEDURE, ATTORNEYS, APPEALS.

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

CONTRACT LAW, NONWILLFUL AND WILLFULL BREACHES.

IN THE CONTEXT OF A CONTRACT IMPOSING CAPS FOR "NONWILLFUL" AND "WILLFUL" BREACHES, THE FACT THAT THE BREACH MAY HAVE BEEN DELIBERATE DID NOT RENDER THE BREACH "WILLFUL," WHICH SHOULD BE INTERPRETED TO REFER TO "TRULY HARMFUL, CULPABLE CONDUCT;" SUPREME COURT REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the term "willful" in the context of the damages provision of the contract should not be interpreted simply to mean "deliberate," but rather to refer to "truly culpable, harmful conduct." Therefore the damages cap for nonwillful breaches applied:

In the context of this contract, the term "willful" must be understood to be "truly culpable, harmful conduct" … and not … "merely intentional nonperformance" … . As the Court of Appeals noted … , "[g]enerally in the law of contract damages, as contrasted with damages in tort, whether the breaching party deliberately rather than inadvertently failed to perform contractual obligations should not affect the measure of damages" and "[t]he policy which runs through the fabric of the law of contracts is to bind a party by what he agrees to do whether or not he intends to do what he agrees" … . The last clause in the limitation-of-liability provision refers to special damages in the context of breaches caused willfully or by gross negligence. Thus,"[u]nder the interpretation tool of ejusdem generis applicable to contracts as well as statutes, the phrase 'willful acts' [or 'caused willfully' …] should be interpreted here as referring to conduct similar in nature to the . . . 'gross negligence' with which it was joined . . ." … . MUFG Union Bank, N.A. v Axos Bank, 2021 NY Slip Op 04414, First Dept 7-15-21

CONTRACT LAW, STIPULATION OF SETTLEMENT, ATTORNEYS.

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

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Moulton, overruling precedent, determined it is no longer necessary for an attorney to retype his or her name in an email stipulation of settlement. As long as the attorney's name appears in the "prepopulated" area of the email it will be deemed to have been signed by the attorney:

We now hold that this distinction between prepopulated and retyped signatures in emails reflects a needless formality that does not reflect how law is commonly practiced today. It is not the signoff that indicates whether the parties intended to reach a settlement via email, but rather the fact that the email was sent. Since 1999, New York State has joined other states in allowing, in most contexts, parties to accept electronic signatures in place of "wet ink" signatures. Section 304(2) of New York's Electronic Signatures and Records Act (ESRA) provides: "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand." Moreover, the statutory definition of what constitutes an "electronic signature" is extremely broad under the ESRA, and includes any "electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record" (State Technology Law § 302[a]). We find that if an attorney hits "send" with the intent of relaying a settlement offer or acceptance, and their email account is identified in some way as their own, then it is unnecessary for them to type their own signature. Matter of Philadelphia Ins. Indem. Co. v Kendall, 2021 NY Slip Op 04284, First Dept 7-8-21

CRIMINAL LAW, APPEALS.

A SUPPRESSION MOTION CANNOT BE DENIED ON A GROUND NOT RAISED BY THE PEOPLE (FIRST DEPT).

The First Department, holding the appeal in abeyance, noted that a suppression motion may not be denied on a ground not raised by the People:

The motion to suppress should not have been denied on a ground not raised by the People. It is unclear to what extent the suppression court considered and credited the People's argument regarding probable cause or whether the search was outside of the Fourth Amendment's purview under the circumstances. Accordingly, we hold the appeal in abeyance and remand for determination, based on the hearing minutes, of the issues raised at the hearing, but not decided … . People v Hatchett, 2021 NY Slip Op 04282, First Dept 7-8-21

CRIMINAL LAW, DISCOVERY. DEFENDANT WAS ENTITLED TO A HEARING TO DETERMINE WHETHER THE SECURITY GUARD WHO RECOVERED STOLEN PROPERTY FROM HIM WAS LICENSED TO EXERCISE POLICE POWERS OR WAS ACTING AS AN AGENT OF THE POLICE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, determined defendant was entitled to a hearing on whether the store security guard who detained him was licensed to exercise police powers or was acting as an agent of the police. Although the defendant had already pled guilty and was sentenced, the information available to the defendant did not identify the person who detained him and, therefore, defendant could hot have subpoenaed employment records to ascertain the security guard's employment status:

Under People v Mendoza (82 NY2d 415, 425, 433—434 [1993]), defendant is entitled to a hearing on the purely factual issue of whether or not the security guard

involved in his detention was licensed to exercise police powers, or acting as an agent of the police. * * *

… [T]he felony complaint provided no information regarding defendant's arrest, and the VDF simply indicated that the arrest took place on "May 27, 2027," at "9:04 PM," "Inside Bergdorf Goodman at 754 Fifth Avenue." The individual who allegedly recovered the stolen material from defendant's handbag was neither identified by name nor as an employee of Bergdorf.

This information could not have helped defendant further investigate whether the security guard was a private or state actor status. People v Sneed, 2021 NY Slip Op 05095, First Dept 9-28-21

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENSE COUNSEL TOLD THE COURT DURING THE PRE-TRIAL SUPPRESSION HEARING THAT DEFENDANT WAS NOT CONTESTING HIS CONSENT TO THE INTOXILYZER BREATH TEST; SUPREME COURT PROPERLY DENIED DEFENDANT'S ATTEMPT TO RAISE THAT SAME SUPPRESSION ISSUE DURING TRIAL; THE DISSENT DISAGREED (FIRST DEPT).

The First Department, over a dissent, determined defendant's attempt, during trial, to suppress the results of the Intoxilyzer breath test was properly denied. Defense counsel had told the court, during the pretrial suppression hearing. defendant did not wish to contest the validity of his consent to the breath test and, consequently, the prosecutor did not introduce a video of the procedure:

A defendant may move to suppress the results of a chemical test administered pursuant to Vehicle and Traffic Law § 1194(3) (see CPL 710.20[5]) by filing a motion "within forty-five days after arraignment and before commencement of trial, or within such additional time as the court may fix upon application" (see CPL 255.20[1]). CPL 255.20(3) prescribes that for pretrial motions filed outside the 45-day limitation, the court "must entertain and decide on its merits, at any[]time before the end of the trial, any appropriate pre-trial motion based upon grounds of which

the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised within the period specified." The section also provides that any other motion not filed within the specified time "may be summarily denied."

The record indicates that when counsel made the omnibus motion, dated September 12, 2017, defendant was well aware of the facts underlying the administration of the Intoxilyzer breath test and, for reasons that are not apparent, chose not to file a motion on that ground. People v Marte, 2021 NY Slip Op 04648, First Dept 8-5-21

CRIMINAL LAW, EVIDENCE.

THE PEOPLE PROPERLY RELIED ON HEARSAY TO DEMONSTRATE PROBABLE CAUSE AT THE SUPPRESSION HEARING; THE DEFENDANT DID NOT PRESENT ANY EVIDENCE TO CALL THE RELIABILITY OF THE HEARSAY INTO QUESTION (FIRST DEPT).

The First Department explained the People's burden of proof when relying on hearsay evidence at a suppression hearing. Here the transit officers who witnessed defendant commit "farebeating" (providing probable cause) were not called to testify. The hearsay was deemed admissible under Aguilar-Spinelli and the defendant did not call the accuracy or reliability of the hearsay into question by cross-examination or the presentation of evidence:

Defendant's main argument on appeal is that the People failed to meet their burden of coming forward with evidence demonstrating probable cause with respect to the underlying theft of services arrest — which created the circumstances for the testifying officer's discovery of defendant — because they did not present any testimony from the Transit Bureau officers who had firsthand knowledge of the farebeating offense. …

Probable cause may properly be established based on hearsay testimony … , such as the officer's testimony about what he was told by the transit officers, so long as, under the Aguilar-Spinelli test, the People establish that there was "some basis" of knowledge for the underlying statement and that it was "reliable"… . The "some

basis" requirement is satisfied where, as here, the information is based on personal knowledge … .

Although the People will fail to meet their burden at a suppression hearing where they rely exclusively on hearsay evidence and "the defense challenges the sufficiency of the evidence, whether by cross-examining the People's witness or putting on a defense case" … , that is not the situation here, because defendant did not present any evidence, identify anything in the People's case, or elicit any statements on cross-examination that undercut the veracity of the transit officers' account of a farebeating, as relayed by the testifying officer … . The unsupported assertion in defendant's moving papers that he was seized without reason was not sufficient to necessitate calling the transit officers as witnesses. People v Gerard, 2021 NY Slip Op 05089, First Dept 9-28-21

FAMILY LAW, DIVORCE, CONTRACT LAW, REAL PROPERTY LAW.

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

LANDLORD-TENANT, MUNICIPAL LAW.

SUPREME COURT PROPERLY REJECTED THE LANDLORD'S CALCULATION OF RENT OVERCHARGES FOR RENT-REGULATED APARTMENTS REMOVED FROM RENT STABILIZATION WHILE THE BUILDING WAS RECEIVING J-51 TAX BENEFITS (FIRST DEPT).

The First Department, over a dissent, determined Supreme Court properly refused to consider defendant landlord's (Whitehouse's) calculation of rent overcharges and ordered calculation by a referee. The landlord had removed rent-regulated apartments from rent stabilization while the building received J-51 tax benefits:

We find that the motion court correctly determined that plaintiffs' legal regulated rent should be calculated according to the default formula set forth in RSC (9 NYCRR) § 2522.6(b). Although defendants may have been following the law in deregulating apartments during the period before Roberts [13 NY3d 270] was decided (see Regina, 35 NY3d at 356), their 2012 retroactive registration of the improperly deregulated apartments was an attempt to avoid the court's adjudication of the issues and to impose their own rent calculations rather than face a determination of the legal regulated rent within the lookback period. Casey v Whitehouse Estates, Inc., 2021 NY Slip Op 04646, First Dept 8-5-21

MUNICIPAL LAW, PRIVILEGE.

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

MUNICIPAL LAW, SUMMARY INQUIRY.

PETITION SEEKING A SUMMARY INQUIRY PURSUANT TO THE NYC CHARTER INTO THE CIRCUMSTANCES SURROUNDING ERIC GARNER'S ARREST AND DEATH PROPERLY GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, determined Supreme Court properly granted the petition seeking seeking a "summary inquiry pursuant to NYC Charter section 1109" into the circumstances surrounding the arrest and death of Eric Garner. The opinion is too detailed and comprehensive to fairly summarize here:

This appeal from the grant of a petition for summary inquiry pursuant to New York City Charter § 1109 has its genesis in the fatal arrest of Eric Garner and the subsequent investigations and actions that this tragedy prompted. We find that this is the rare case in which allegations of significant violations of duty, coupled with a serious lack of substantial investigation and public explanation, warrant a summary inquiry to bring transparency to a matter of profound public importance: the death of an unarmed civilian during the course of an arrest. * * *

… Petitioners seek an order convening a summary inquiry into "violations and neglect of duties" by respondents in seven areas:

(1) the stop and arrest of Garner and the force used by officers on him;

(2) the failure, after Garner's death, to train NYPD officers adequately as to appropriate guidelines for the use of force and the prohibition on the use of chokeholds;

(3) filing false official NYPD documents concerning the arrest and making false statements in connection with NYPD's internal investigation of Garner's death;

(4) unlawfully leaking Garner's alleged arrest and medical histories;

(5) incomplete and inaccurate statements to the media by the City concerning Garner's arrest;

(6) the medical care provided to Garner; and

(7) the City's investigation and adjudication of, and imposition of discipline for the foregoing, including false statements by NYPD officers concerning the arrest. Matter of Carr v De Blasio, 2021 NY Slip Op 04412, First Dept 7-15-21

NEGLIGENCE, SLIP AND FALL.

THERE IS A QUESTION OF FACT WHETHER DEFENDANTS HAD CONSTRUCTIVE NOTICE OF THE WORN STEP IN THIS SLIP AND FALL CASE; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether defendants had constructive notice of the condition of a step in this slip and fall case:

… [T]he affidavit of plaintiff's expert and the photographic evidence were sufficient to raise an issue of fact as to constructive notice. The expert opined that the condition depicted in the photographs violated the Building Code and that the step was worn for several years prior to the accident. Furthermore, the photographs depicted a condition that a jury might find was present for a sufficient time for defendants to have discovered and remedied it … . Martinez v 560-568 Audubon Realty LLC, 2021 NY Slip Op 04277, First Dept 7-8-21

REAL PROPERTY LAW, CONTRACT LAW, NEGLIGENCE, CIVIL PROCEDURE.

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).

The First Department, in an extensive opinion by Justice Moulton, addressed several unusual issues stemming from the allegation the renovation of defendant's neighboring property damaged plaintiffs' property. Two separate trials were held: a jury trial on tort (negligence) claims; and a nonjury trial on breach of contract claims (i.e., the contract allowing defendants access to plaintiffs' property to facilitate the renovation). In the nonjury breach of contract action plaintiffs were awarded $6,255,007 for repair costs and $1,152,000 for alternate living expenses. In the jury trial (tort action) plaintiffs were awarded $5,000,000 for repair and $500,000 for alternate living expenses. The issues decided in plaintiff's appeal are: the breach of contract judgment is appealable as a final judgment; Supreme Court properly precluded expert testimony on the loss of market value in plaintiffs' home. The issues decided in defendant's cross appeals are: Supreme Court properly denied defendant's motion to set aside the breach of contract judgment and adopt the jury's tort judgment; plaintiffs were entitled to conditional contractual indemnification from defendant. The final judgment which was entered used the breach of contract (nonjury trial) damages, plus interest and attorney's fees totaling over $12 million. With respect to whether the judgment was appealable as a final judgment, the court wrote:

Our conclusion that the contract judgment is a final judgment starts with the definition of a judgment. "A judgment is the determination of the rights of the parties

in an action or special proceeding and may be either interlocutory or final" (CPLR 5011; see also CPLR 105 [k] ["The word 'judgment' means a final or interlocutory judgment"]). "[A] fair working definition of the concept can be stated as follows: a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters" … . Shah v 20 E. 64th St., LLC, 2021 NY Slip Op 04587, First Dept 7-29-21

SECURITIES, CIVIL PROCEDURE.

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

SECURITIES, FRAUD.

IN THIS "RESIDENTIAL MORTGAGE BACKED SECURITIES" AND "COLLATERALIZED DEBT OBLIGATION" ACTION, PLAINTIFF RAISED QUESTIONS OF FACT ABOUT WHETHER DEFENDANTS' FRAUD, AS OPPOSED TO THE 2008-2009 FINANCIAL CRISIS, CAUSED PLAINTIFF'S LOSS, AND WHETHER AN OMISSION ON DEFENDANTS' PART WAS AN ACTIONABLE MISREPRESENTATION; SUPREME COURT REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, over an extensive dissent, determined defendants' motion for summary judgment in this "residential mortgage backed securities (RMBS)" and "collateralized debt obligation (CDO)" fraud action should not have been granted. The plaintiff raised questions of fact whether defendants' fraud, as opposed to the 2008-2009 financial crisis, caused plaintiff's loss, and whether an omission on defendants' part constituted an actionable misrepresentation:

"The empirical evidence shows that Magnetar deals in general, and Auriga in particular, performed worse than other mezzanine CDOs issued during the same period." For example, the [plaintiff's] expert noted, "Magnetar deals experienced events of default ['EODs'] on average approximately four months faster than other mezzanine CDO bonds issued in 2006 and 2007" and Auriga "failed 175 days earlier than the average mezzanine non-Magnetar deal." The expert further explained, "[a]ll 26 mezzanine Constellation deals experienced an [EOD.] This 100 percent EOD rate contrasts with an EOD rate of 82 percent . . . among non-Magnetar subprime CDOs issued in 2006 and 2007. The difference between these two EOD rates . . . is statistically significant." * * *

With regard to lack of justifiable reliance on misrepresentations, the other ground on which the motion court granted summary judgment, plaintiff's fraud claim depends both on an affirmative representation (that Auriga's collateral manager would independently select the collateral) and an omission or concealment (that defendants structured Auriga to facilitate Magnetar's net-short strategy). * * *

… [T]o the extent plaintiff relies on an omission, its claim is not barred. … [T]he omission in the instant action came from defendants … . Loreley Fin. (Jersey) No. 28, Ltd. v Merrill Lynch, Pierce, Fenner & Smith Inc., 2021 NY Slip Op 04413, First Dept 7-15-21

ZONING, LAND USE, MUNICIPAL LAW.

THE NYC BOARD OF STANDARDS AND APPEALS (BSA) PROPERLY APPROVED THE CONSTRUCTION OF A BUILDING IN THE SPECIAL LINCOLN SQUARE DISTRICT ON A SPLIT-LOT, I.E., A LOT THAT STRADDLES TWO ZONING DISTRICTS, EACH WITH ITS OWN LIMITATIONS ON USE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, reversing Supreme Count, determined the NYC Board of Standards and Appeals (BSA) properly approved the construction of a building in the Special Lincoln Square District. The project is on a zoning lot that straddles to zoning districts, each with its own limitations on uses, a so-called split-lot:

This Court has held that a split lot is treated as a single lot when assessing compliance with a zoning requirement that applies equally to both zoning districts of the split lot and that the split-lot provision is applied on a "regulation-by-regulation basis" … . ZR § 82-34, the relevant bulk distribution regulation, provides that "[w]ithin the Special District, at least 60 percent of the total floor area permitted on a zoning lot" must be below a height of 150 feet from curb level. There is no dispute that the project complied with ZR § 82-34. Practically speaking, this provision directly regulates the distribution of a building's floor area and indirectly regulates height by restricting much of a zoning lot's floor area to the part of a building below a cutoff. Every square foot that needs to be below the 150-foot ceiling to comply with ZR § 82-34 reduces the number of square feet that could be above it. ,,, As noted by BSA, "the Special District's bulk-distribution regulations do operate to reduce the height of buildings in the Special District — only not to the extent [petitioner] wish[es]" … . … BSA held that this regulation applies to both … zoning districts because it is located in a "Special District." … ZR § 82-34's imposition of the bulk distribution regulation within the Special Lincoln Square District creates …

commonality … so as to override the split-lot provision's prohibition against transfer of floor area between the two zoning districts, and permits the two zoning districts to be treated as one. Under these circumstances, we find that BSA's determination to apply ZR § 82-34 to the project's zoning lot was rational. City Club of N.Y. v New York City Bd. of Stds. & Appeals, 2021 NY Slip Op 04533, First Dept 7-22-21