

NEW YORK APPELLATE DIGEST, LLC

A Succinct Compilation of the Salient Issues Raised in the Decisions
Addressing Civil Procedure Released by Our New York State Appellate Courts
and Summarized on the New York Appellate Digest in October 2021. Right
Click on the Citations to Keep Your Place in the Pamphlet.
Copyright 2021 New York Appellate Digest, LLC

Civil Procedure
Practice Newsletter
October 2021

ANSWERS, ENTRY OF THE ORDER DENYING A MOTION TO DISMISS STARTS THE TIME FOR SERVING AN ANSWER.

THE COURT NEVER ENTERED AN ORDER RE: DEFENDANT'S MOTION TO DISMISS; THEREFORE THE TIME FOR DEFENDANT TO INTERPOSE AN ANSWER IN THIS FORECLOSURE ACTION NEVER STARTED TO RUN (SECOND DEPT).

HSBC Bank USA, N.A.. v Sewell, 2021 NY Slip Op 05850, Second Dept 10-27-21

Practice Point: The time to file an answer (10 days) after losing a pre-answer motion to dismiss doesn't start running until notice of entry of the order denying dismissal is served.

ATTORNEYS, FRIVOLOUS CONDUCT.

PLAINTIFF AND HIS ATTORNEY SENT 75 LETTERS TO HARASS DEFENDANTS; SANCTIONS FOR FRIVOLOUS CONDUCT SHOULD HAVE BEEN IMPOSED (SECOND DEPT).

Glaubach v Slifkin, 2021 NY Slip Op 05323, Second Dept 10-7-21

Practice Point: Conduct is frivolous warranting sanctions if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1[c]). Here letters to defendants sent by plaintiff and plaintiff's attorney constituted frivolous conduct.

CONFORM PLEADINGS TO PROOF.

PLAINTIFF SHOULD NOT HAVE BEEN ALLOWED TO CONFORM THE PLEADINGS TO THE PROOF RE: PIERCING THE CORPORATE VEIL; DEFENDANT WAS PREJUDICED BY THE FAILURE TO PLEAD THE SUPPORTING ALLEGATIONS (SECOND DEPT).

Americore Drilling & Cutting, Inc. v EMB Contr. Corp., 2021 NY Slip Op 05845, Second Dept 10-27-21

Practice Point: A motion to conform the pleadings to the proof after trial will be denied if defendant would be prejudiced. Here the complaint did not include factual allegations which would support piercing the corporate veil. The motion to conform the pleadings to the proof should not have been granted.

DISCLOSURE, LANDLORD-TENANT, COVID.

DEFENDANT TENANT CLOSED ITS BUSINESS AND ABANDONED THE LEASED PROPERTY DUE TO THE COVID PANDEMIC; PLAINTIFF LANDLORD TOOK POSSESSION OF THE PROPERTY AND CHANGED THE LOCKS; DEFENDANT WAS ENTITLED TO DISCOVERY TO DETERMINE WHETHER DEFENDANT ACCEPTED SURRENDER OF THE PREMISES AND THE APPROPRIATE AMOUNT OF DAMAGES (FOURTH DEPT).

University Sq. San Antonio, Tx. LLC v Mega Furniture Dezavala, LLC, 2021 NY Slip Op 05192, Fourth Dept 10-1-21

Practice Point: Where there is a question whether the landlord accepted the tenant's surrender of the leased premises, here because the tenant's business closed due to COVID, the tenant is entitled to discovery to determine whether the accelerated rent constituted a penalty.

FAMILY COURT, AUTHORITY OF.

FAMILY COURT DOES NOT HAVE THE AUTHORITY TO DIRECT THE DEPARTMENT OF SOCIAL SERVICES (DSS) TO COMMENCE A NEGLECT PROCEEDING (THIRD DEPT).

Matter of Donald QQ. v Stephanie RR., 2021 NY Slip Op 05760, Third Dept 10-21-21

Practice Point: Family Court does not have the authority to direct the Department of Social Services to commence neglect proceedings.

FAMILY COURT, JURISDICTION, HOME STATE.

FAMILY COURT DID NOT MAKE THE REQUIRED INQUIRIES BEFORE DETERMINING NEW YORK DID NOT HAVE JURISDICTION OVER THIS NEGLECT PROCEEDING; MOTHER AND CHILD WERE IN CONNECTICUT, FATHER RESIDED IN NEW YORK (SECOND DEPT).

Matter of Jenny M. (Thomas M.), 2021 NY Slip Op 05701, Second Dept 10-20-21

Practice Point: Where the child in a neglect proceeding resides in another state, Family Court must make findings of fact required by the Domestic Relations Law to determine whether Family Court has jurisdiction over the matter.

FORECLOSURE, CERTIFICATE OF MERIT.

IN A FORECLOSURE ACTION, ANY DEFICIENCIES IN PLAINTIFF'S COUNSEL'S CERTIFICATE OF MERIT (CPLR 3012-B) CAN NOT BE THE BASIS FOR DEFENDANT'S MOTION TO DISMISS ALLEGING PLAINTIFF'S LACK OF STANDING (SECOND DEPT).

Wilmington Sav. Fund Socy., FSB v Matamoro, 2021 NY Slip Op 05741, Second Dept 10-20-21

Practice Point: In a foreclosure action, deficiencies in plaintiff-bank's attorney's certificate of merit cannot be the basis for a defendant's motion to dismiss for lack of standing.

FORECLOSURE, REFORECLOSURE, AFFIRMATIVE DEFENSE.

THERE WAS A QUESTION OF FACT WHETHER THE PLAINTIFF'S FAILURE TO INCLUDE DEFENDANT IN THE ORIGINAL FORECLOSURE PROCEEDING WAS THE RESULT OF "WILFUL NEGLIGENCE;" THEREFORE, PURSUANT TO RPAPL 1523, DEFENDANT'S "WILFUL-NEGLECT" AFFIRMATIVE DEFENSE IN THIS REFORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

U.S. Bank N.A. v Lomuto, 2021 NY Slip Op 05363, Second Dept 10-6-21

Practice Point: In a reforeclosure action, the plaintiff must demonstrate that the defect in the original foreclosure action "was not due to fraud or wilful neglect of the plaintiff and that the defendant or the person under whom he claims was not actually prejudiced thereby" (RPAPL 1523[2]).

FORECLOSURE, SETTLEMENT CONFERENCE, RIGHT TO COUNSEL.

PURSUANT TO CPLR 3408 (B), WHEN DEFENDANTS IN THIS FORECLOSURE ACTION APPEARED WITHOUT COUNSEL AT THE SETTLEMENT CONFERENCE, SUPREME COURT SHOULD HAVE DETERMINED WHETHER THEY WERE ENTITLED TO ASSIGNED COUNSEL, MATTER REMITTED (THIRD DEPT).

Carrington Mtge. Servs., LLC v Fiore, 2021 NY Slip Op 05743, Third Dept 10-21-21

Practice Point: If the defendant appears in a pre-foreclosure settlement conference without counsel, the judge must determine whether the defendant can proceed as a poor person and thereby be eligible for assigned counsel.

JUDGES, UNAUTHORIZED PREMATURE CONSIDERATION OF THE MERITS.

SUPREME COURT ADDRESSED THE MERITS OF THE ACTION WITHOUT DISCOVERY AND TRIAL; THE COURT SHOULD ONLY HAVE DECIDED WHETHER PETITIONER WAS ENTITLED TO A PRELIMINARY INJUNCTION; MATTER REMITTED FOR PROCEEDINGS BEFORE A DIFFERENT JUDGE (THIRD DEPT).

Matter of Murnane Bldg. Contrs., Inc. v New York State Olympic Regional Dev. Auth., 2021 NY Slip Op 05756, Third Dept 10-21-21

Practice Point: Obviously a judge cannot prematurely determine the merits of an action if only a motion for a preliminary injunction is before the court.

JUDGES, UNAUTHORIZED PREMATURE CONSIDERATION OF THE MERITS.

WHERE RESPONDENTS MADE A PRE-ANSWER MOTION TO DISMISS, THE ULTIMATE RELIEF SOUGHT BY PETITIONER SHOULD NOT HAVE BEEN GRANTED; THE MATTER WAS REMITTED TO ALLOW RESPONDENTS TO ANSWER THE PETITION (SECOND DEPT).

Matter of O'Hara v Board of Educ., Yonkers City Sch. Dist., 2021 NY Slip Op 05703, Second Dept 10-20-21

Practice Point: Again, obviously, a judge cannot determine the merits of an action when only a pre-answer motion to dismiss is before the court.

JURISDICTION (SUBJECT MATTER), EMPLOYMENT LAW, HUMAN RIGHTS LAW.

SUPREME COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S HOSTILE WORK ENVIRONMENT CLAIMS; THE CONDUCT OCCURRED WHEN PLAINTIFF WAS NOT PHYSICALLY IN NEW YORK AND DID NOT HAVE ANY IMPACT ON THE TERMS, CONDITIONS OR EXTENT OF HER EMPLOYMENT WITHIN NEW YORK; THE FACTS WERE NOT DESCRIBED (FIRST DEPT).

Jarusauskaite v Almod Diamonds, Ltd., 2021 NY Slip Op 05460, First Dept 10-12-21

Practice Point: The facts of this employment discrimination action were not described in the decision. Supreme Court did not have subject matter jurisdiction over the action, even though the alleged discriminatory acts occurred in New York.

JURISDICTION, CORPORATIONS.

A FOREIGN CORPORATION WHICH REGISTERS TO DO BUSINESS IN NEW YORK CONSENTS TO THE SERVICE OF PROCESS IN NEW YORK BUT DOES NOT CONSENT TO THE GENERAL JURISDICTION OF NEW YORK (CT APP).

Aybar v Aybar, 2021 NY Slip Op 05393, Ct App 10-7-21

Practice Point: The Court of Appeals, in an important opinion, determined corporations do not agree to general jurisdiction in New York by registering, for service of process purposes, with New York's Secretary of State.

SUMMARY JUDGMENT, CONVERSION OF MOTION TO DISMISS.

THE MOTION TO DISMISS THIS ACTION TO QUIET TITLE SHOULD NOT HAVE BEEN CONVERTED TO A MOTION FOR SUMMARY JUDGMENT TO WHICH PLAINTIFFS HAD NO OPPORTUNITY TO RESPOND; THE COMPLAINT STATED A CAUSE OF ACTION TO QUIET TITLE PURSUANT TO RPAPL ARTICLE 15 (FIRST DEPT).

Davis v Augoustopoulos, 2021 NY Slip Op 05772, First Dept 10-21-21

Practice Point: If a judge converts a motion to dismiss to a motion for summary judgment, the plaintiff must be given an opportunity to respond to any allegations made by defendant in reply.

SUMMARY JUDGMENT, SUBMISSION OF UNDISCLOSED EVIDENCE.

AN AFFIDAVIT WITH A PARTY STATEMENT AND A NON-PARTY AFFIDAVIT WHICH WERE NOT DISCLOSED SHOULD HAVE BEEN CONSIDERED IN OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT IN THIS DOG-BITE CASE (FOURTH DEPT)

[Vikki-lynn A. v Zewin, 2021 NY Slip Op 05412, Fourth Dept 10-8-21](#)

Practice Point: The court in this dog-bite case abused its discretion by prohibiting plaintiff from relying on affidavits which included previously undisclosed statements by a party (defendant) and by a nonparty witness submitted in opposition to defendant’s motion for summary judgment. The defendant was aware of the affiant whose affidavit included a statement by defendant but did not depose her. The nonparty witness was deposed and the statement was privileged as material prepared for litigation.

SUMMARY JUDGMENT, LATE MOTION FOR.

A LATE MOTION FOR SUMMARY JUDGMENT SHOULD NOT BE CONSIDERED ON THE MERITS ABSENT GOOD CAUSE FOR THE DELAY (SECOND DEPT).

[Bennett v State Farm Fire & Cas. Co., 2021 NY Slip Op 05687, Second Dept 10-20-21](#)

Practice Point: A late motion for summary judgment should not be considered by the court absent showing good cause for the delay in bringing the motion.

VENUE, DEFENDANT DOCTOR WORKED IN TWO COUNTIES.

ALTHOUGH DEFENDANT DOCTOR PRACTICED IN THE BRONX FOR PART OF EACH WEEK, THE PRINCIPAL OFFICE OF HIS BUSINESS AND HIS RESIDENCE WERE IN WESTCHESTER COUNTY, WHERE PLAINTIFF WAS TREATED; SUPREME COURT PROPERLY GRANTED DEFENDANTS' MOTION TO CHANGE THE VENUE FROM BRONX TO WESTCHESTER COUNTY (CT APP).

Lividini v Goldstein, 2021 NY Slip Op 05618, CtApp 10-14-21

Practice Point: The defendant doctor in this medical malpractice action resided and treated plaintiff in Westchester County. The fact that the doctor saw patients every week in Bronx County was not enough to allow the action to be brought there.

Copyright © 2021 New York Appellate Digest, LLC.