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An Organized Compilation of the Summaries of Selected NYS Appellate Decisions Released November 1 – 5, 2021 and Posted on the New York Appellate Digest Website on Monday, November 8, 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 of Any Page to Return There. Right Click on the Citations to Keep Your Place in the Newsletter. New! "Practice Points" Included to Succinctly Highlight the Significance of the Decisions.

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Contents

Table of Contents

Table of Contents

CIVIL PROCEDURE, ATTORNEYS.

THE ACTION WAS NOT COMMENCED UNTIL TEN DAYS BEFORE THE STATUTE OF LIMITATIONS EXPIRED AND PLAINTIFF'S COUNSEL DID NOT TIMELY COMPLETE SERVICE BY MAILING THE SUMMONS AND COMPLAINT; PLAINTIFF WAS NOT ENTITLED TO AN EXTENSION OF TIME TO SERVE THE DEFENDANT BECAUSE LAW OFFICE FAILURE PRECLUDED AN EXTENSION FOR GOOD CAUSE AND THE LACK OF DILIGENCE PRECLUDED AN EXTENSION IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department determined plaintiff did not demonstrate could good cause for failing to timely mail the summons and complaint to defendant and was not entitled to an extension of time to serve the defendant in the interest of justice. The court noted that law-office-failure precludes an extension for good cause, and the attorney's lack of diligence in filing the action (ten days before the expiration of the statute of limitations) and in serving the pleadings ruled out an extension in the interest of justice:

The plaintiff failed to demonstrate that she was entitled to an extension of time to serve Marin [defendant] for good cause, as she failed to establish that she exercised reasonably diligent efforts in attempting to effect proper service … . The plaintiff's attorney's mistake in failing to note, until pointed out in the defendants' reply papers, that Marin had not been served by mail, amounts to law office failure, which does not constitute good cause … .

… [T]he plaintiff failed to establish her entitlement to an extension of time for service in the interest of justice given the lack of diligence in commencing the action, which was not commenced until 10 days before the statute of limitations expired; the lack of diligence in effecting service; the more than six-month delay between the time the summons and complaint were filed and the time the plaintiff's cross motion, inter alia, for an extension was made; and the lack of an excuse, other than law office failure, for the failure to effect timely service … . Jordan-Covert v Petroleum Kings, LLC, 2021 NY Slip Op 05960, Second Dept 11-3-21

Practice Point: Law office failure does not support an extension of time for service for good cause. An overall lack of diligence, including filing the action right before the statute of limitations expires, will preclude an extension in the interest of justice.

CIVIL PROCEDURE, ATTORNEYS.

THE DEFENDANT'S EXECUTION OF A POWER OF ATTORNEY IN FAVOR OF HER (NON-ATTORNEY) HUSBAND DID NOT AUTHORIZE HER HUSBAND TO FILE COURT PAPERS ON HER BEHALF IN RESPONSE TO PLAINTIFF'S ACCOUNT STATED ACTION; THE HUSBAND'S REPRESENTATION OF DEFENDANT IS PROHIBITED BY THE JUDICIARY LAW (SECOND DEPT).

The Second Department determined defendant's husband could not represent the defendant in this account stated action based upon his holding a power of attorney executed by the defendant:

The plaintiff commenced this action, inter alia, to recover on an account stated, alleging that the defendant failed to pay sums due on her credit card account. Following service of the summons and complaint, the defendant's husband, James W. Gilliam II (hereinafter Gilliam), purportedly in his capacity as the defendant's attorney-in-fact by short form power of attorney, in accordance with New York General Obligations Law §§ 5-1502A-N, filed with the court an answer and certain cross claims on behalf of the defendant. …

"New York law prohibits the practice of law in this State on behalf of anyone other than himself or herself by a person who is not an admitted member of the Bar, regardless of the authority purportedly conferred by execution of a power of attorney" … . The designation as an attorney-in-fact under General Obligations Law §§ 5-1502A-N does not confer upon a designated agent the right to provide representation as an attorney-at-law, and "cannot be read to displace the provisions of Judiciary Law § 478" … . Discover Bank v Gilliam, 2021 NY Slip Op 05949, Second Dept 11-3-21

Practice Point: A power of attorney executed by a party does not authorize the attorney-in-fact to represent the party in court proceedings.

CIVIL PROCEDURE, CONTRACT LAW.

THE PRE-ANSWER, PRE-DISCOVERY MOTION TO DISMISS SHOULD NOT HAVE BEEN CONVERTED TO A SUMMARY JUDGMENT MOTION; QUESTIONS OF FACT ABOUT WHETHER THERE WAS A DE FACTO MERGER OF TWO CORPORATIONS; QUESTION OF FACT WHETHER PART PERFORMANCE BY INACTION STATISFIED THE STATUTE OF FRAUDS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined (1) the pre-answer, pre-discovery motion to dismiss should not have been converted to a summary judgment motion; (2) there were questions of fact about whether there was a de facto merger of two defendant corporations; and (3) there was a question of fact whether the breach of contract action was barred by the statute of frauds (part performance). The "de facto merger" and "part performance" discussions are substantive and too detailed to summarize here. The Second Department noted that even inaction will satisfy part performance of a contract when inaction is a term of the oral agreement:

Supreme Court erred in converting the motion to dismiss to one for summary judgment (see CPLR 3211[c] …). The plaintiff objected to this procedure on the ground that he had not received any discovery, and no preliminary conference had taken place due to the pendency of the motion to dismiss, which was made only one month after this action was commenced. Indeed, a motion for summary judgment is premature when a party had no reasonable opportunity to conduct discovery, and discovery may result in disclosure of evidence relevant to the causes of action asserted in the complaint (see CPLR 3212[f] …). Here, issue was not yet joined and there had been no opportunity to engage in discovery regarding the plaintiff's allegations of successor liability and fraud with respect to the apparent transformation of [defendant] Labs into [defendant] Diagnostics. Therefore, converting the motion to dismiss into a motion for summary judgment was premature.

… The defendants' evidence did not establish as a matter of law that Diagnostics was not the de facto continuation of Labs … . * * *

Part performance in the form of inaction may … suffice to invoke the doctrine, if inaction is pleaded as a term of the oral agreement and alleged to be unequivocally referable to the oral agreement, and the element of detrimental reliance is present … . … [D]efendants failed to demonstrate … that the plaintiff did not partially perform by refraining from seeking to confirm the arbitration award, thereby rendering the statute of frauds inapplicable. Menche v CDx Diagnostics, Inc., 2021 NY Slip Op 05964, Second Dept 11-3-21

Practice Point: It didn't make sense to convert a pre-answer motion to dismiss to a motion for summary judgment. Issue had not yet been joined and there had been no discovery.

Practice Point: Inaction can constitute part performance of an oral contract which removes the matter from the reach of the statute of frauds.

CIVIL PROCEDURE, QUI TAM.

PLAINTIFF-RELATOR BROUGHT A QUI TAM ACTION (ON BEHALF OF THE GOVERNMENT) AGAINST A BANK ALLEGING VIOLATION OF THE STATE FINANCE LAW; THE QUI TAM ACTION WAS DISMISSED FOR FAILURE TO STATE A CLAIM; EVEN THOUGH THE CITY SETTLED WITH THE BANK IN A RELATED ACTION, PLAINTIFF-RELATOR WAS NOT ENTITLED TO A PERCENTAGE OF THE SETTLEMENT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, determined the plaintiff-relator, who brought a qui tam action against a bank alleging the bank violated the State Finance Law (re: foreign currency exchanges), was not entitled to a percentage of the related settlement reached by the bank and the city. The plaintiff-relator's qui tam action had been dismissed for failure to state a claim which, pursuant to the terms of the relevant statute, precluded sharing in the settlement:

… [T]he City reached a $30 million settlement with defendants. The City made an offer of payment to relator. Relator rejected the offer, asserting that under the NYFCA, it was entitled to no less than 15% of the monies received. …

The NYFCA [New York False Claims Act] tracks the federal False Claims Act (31 USC § 3729 et seq.) (the Federal FCA). Accordingly, it is appropriate to look to federal law to interpret the NYFCA … . Federal authority holds that a relator who fails to state a viable claim under the Federal FCA is not entitled to recovery in an action brought by the government, even where that recovery stems from claims that overlap with the dismissed qui tam claims … . We are persuaded by this precedent and find that relator may not receive compensation under the NYFCA when its claims have been dismissed for failure to state a cause of action. Comptroller of the City of N.Y. v Bank of N.Y. Mellon Corp., 2021 NY Slip Op 06033, First Dept 11-4-21

Practice Point: If a qui tam action (brought on behalf of the government by a private party) is dismissed for failure to state a cause of action, the private party is not entitled to a percentage of any settlement procured by the government in a similar action.

CIVIL PROCEDURE.

PLAINTIFF DID NOT SATISFACTORILY EXPLAIN THE DELAY IN BRINGING THE UNTIMELY CROSS-MOTION FOR SUMMARY JUDMENT; THEREFORE SUPREME COURT SHOULD NOT HAVE CONSIDERED THE MERITS OF THE MOTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's untimely cross-motion for summary judgment should not have been granted because the delay in making the cross-motion was not satisfactorily explained:

Pursuant to CPLR 3212(a), courts have "considerable discretion to fix a deadline for filing summary judgment motions" … , so long as the deadline is not "earlier than 30 days after filing the note of issue or (unless set by the court) later than 120 days

after the filing of the note of issue, except with leave of court on good cause shown" … . Absent a "satisfactory explanation for the untimeliness," constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits … . However, an untimely cross motion for summary judgment may nevertheless be considered by the court "where a timely motion was made on nearly identical grounds" … .

… Supreme Court erred in considering the plaintiff's untimely cross motion. The cross motion was made months after the deadline imposed by the court had elapsed, and the plaintiff offered no explanation for the delay. Contrary to the plaintiff's contention, his cross motion did not raise nearly identical issues as [defendant's] timely motion, which had a different factual basis and addressed substantively different violations of the Industrial Code … . Dojce v 1302 Realty Co., LLC, 2021 NY Slip Op 05950, Second Dept 11-3-21

Practice Point: If good cause for the delay is not demonstrated when bringing a late motion or cross-motion for summary judgment, the court should not consider the merits of the motion.

CRIMINAL LAW, APPEALS.

ROBBERY CONVICTIONS WERE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE OF PHYSICAL INJURY; SEVERAL CONVICTIONS, ALTHOUGH SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE, WERE AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF THE WEAKNESS OF THE IDENTIFICATION EVIDENCE (SECOND DEPT).

The Second Department, reversing defendant's conviction on several counts, determined the evidence the robbery complainants suffered physical injury was legally insufficient, and the weakness of the identification evidence rendered several convictions against the weight of the evidence:

Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00[9]). Here, both complainants testified at trial that they were hit

from behind on the head. Neither of the complainants sought medical attention. One complainant testified that he had pain that lasted two days, and did not testify that he took any medication to treat his pain. The other complainant testified that his pain lasted for about one week and that he treated it with ice and Advil. Under these circumstances, there was insufficient evidence that either of the complainants suffered a physical injury within the meaning of Penal Law § 10.00(9) … . Accordingly, we vacate the defendant's convictions of robbery in the second degree … . * * *

Neither of the complainants who were robbed on February 28, 2016, was able to identify the defendant as one of their assailants, and their descriptions of their assailants as young Hispanic/Latino men about five foot six inches tall wearing dark clothing was not sufficiently distinctive to support an inference that the defendant committed the February 28, 2016 crimes. The modus operandi of the crimes committed on February 28, 2016, and February 29, 2016, was likewise not sufficiently distinctive to support an inference that, because the evidence supported an inference that the defendant committed the February 29, 2016 crimes, he also committed the February 28, 2016 crimes. People v Rodriguez, 2021 NY Slip Op 05990, Second Dept 11-3-21

Practice Point: Robbery second must be supported by sufficient proof of physical injury, which was not presented here.

Practice Point: A conviction can be supported by legally sufficient evidence but still be against the weight of the evidence. Here the weakness of the identification evidence warranted reversal under the "weight of the evidence" standard.

CRIMINAL LAW, GUILTY PLEAS.

THE PLEA AGREEMENT COULD NOT BE FULFILLED BECAUSE THE DEFENDANT WAS NOT ELIGIBLE FOR THE PROMISED SHOCK INCARCERATION PROGRAM; DEFENDANT'S GUILTY PLEA WAS THEREFORE NOT VOLUNTARY; ALTHOUGH THE ISSUE WAS NOT PRESERVED BY A MOTION, THE MATTER WAS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE (THIRD DEPT).

The Third Department, reversing defendant's conviction by guilty plea, determined the plea was invalid because the plea agreement could not be fulfilled. Defendant was promised participation in the shock incarceration program, but a prior violent felony conviction rendered him ineligible. The court noted that the argument the plea was not voluntary (because the promise could not be fulfilled) was not preserved for appeal by a postallocution motion. The appeal was considered in the interest of justice:

There is no dispute that, in light of defendant's prior violent felony conviction, he was not in fact eligible for participation in a shock incarceration program … . Nor is there any question that a judicial mandate for shock incarceration was part and parcel of defendant's plea agreement … . "A guilty plea induced by an unfulfilled promise either must be vacated or the promise honored" … . As the promise made here cannot be honored, and given defendant's insistence that his plea was involuntary, we deem vacatur of the plea and remittal to County Court for further proceedings to be the appropriate remedy … . People v Regan, 2021 NY Slip Op 06007, Third Dept 11-4-21

Practice Point: A guilty plea induced by a sentencing promise, here shock incarceration, which cannot be fulfilled, is not voluntary.

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), JUDGES.

DEFENSE COUNSEL SUBMITTED EVIDENCE IN SUPPORT OF A DOWNWARD DEPARTURE FROM THE PRESUMPTIVE RISK LEVEL BUT COUNTY COURT DID NOT RULE ON IT; MATTER REMITTED FOR FINDINGS OF FACT AND CONCLUSIONS (THIRD DEPT).

The Third Department, remitting the matter, noted that defense counsel submitted evidence in support of a downward departure from the presumptive risk level but County Court made no findings on the request:

The record reflects that defendant's counsel submitted various evidence, including a letter from a social worker who apparently was treating defendant and information regarding, among other things, defendant's consistent compliance with probation, in support of the request for a downward departure. As County Court did not set forth on the record any findings or conclusions on that request, we are unable to assess the court's reasoning. As such, we reverse and remit the matter for County Court to determine whether a departure from the presumptive risk level indicated by defendant's point total is warranted and to set forth its requisite findings of fact and conclusions … . People v Hoffman, 2021 NY Slip Op 06013, Third Dept 11-4-21

Practice Point: In a SORA risk-level proceeding, if the defense presents evidence in support of a request for a downward departure, the judge must consider it and rule on it.

DISCIPLINARY HEARINGS (INMATES).

THE RECORD DOES NOT DEMONSTRATE THE HEARING OFFICER MADE REASONABLE EFFORTS TO SECURE THE TESTIMONY OF AN EYEWITNESS TO THE FIGHT WHICH RESULTED IN THE MISBEHAVIOR REPORT CHARGING THE PETITIONER; NEW HEARING ORDERED (THIRD DEPT).

The Third Department, annulling the determination and ordering a new hearing, determined the hearing officer did not make reasonable efforts to have a witness to the fight, Johnson, testify at petitioner's misbehavior hearing. Petitioner requested the witness's testimony as part of his defense:

The record reflects that, although Johnson agreed to testify at the hearing, the Hearing Officer denied Johnson as a witness stating, without any elaboration, that Johnson was unavailable. Although the Hearing Officer indicated that he made four attempts to procure Johnson as a witness, the record does not indicate, other than on that particular day and time, when those attempts were made by the Hearing Officer or the nature thereof. Furthermore, the Hearing Officer did not complete a witness denial form setting forth any further detail regarding his attempts to contact Johnson or the reasons for Johnson's unavailability. Under these circumstances, we find that the record does not sufficiently reflect whether reasonable and diligent efforts were made by the Hearing Officer to secure Johnson as a witness … . Because the Hearing Officer articulated a good-faith reason for denying the witness, we find that petitioner's regulatory right to call a witness was violated and, therefore, remit the matter for a new hearing … . Matter of Douglas v Annucci, 2021 NY Slip Op 06020, Third Dept 11-4-21

Practice Point: In an inmate disciplinary hearing, the hearing officer must make reasonable efforts to procure the testimony of a witness requested by the inmate. If the hearing officer doesn't make reasonable efforts but has a good-faith reason for denying the request, the denial violates a "regulatory right" and a new hearing will be ordered. If the hearing officer did not have a good faith reason for denying the request, the denial violates a constitutional right and the determination will be annulled.

FAMILY LAW, DIVORCE, MARITAL PROPERTY.

IN THIS DIVORCE ACTION, HUSBAND WAS NOT ENTITLED TO CREDIT FOR MORTGAGE PAYMENTS MADE BEFORE THE TERMINATION OF THE MARRIAGE WAS CONTEMPLATED (SECOND DEPT).

The Second Department determined plaintiff husband in this divorce action should not have been awarded credit for mortgage payments made before terminating the marriage was contemplated:

Supreme Court improvidently exercised its discretion in awarding the plaintiff a credit in the sum of $34,000 for payments he made toward the mortgage on the marital residence. Where a party has paid the other party's share of what proves to be marital debt during the pendency of the action, including payments toward the mortgage on the marital residence, reimbursement is required … . However, "[a]s a general rule, where the payments are made before either party is anticipating the end of the marriage, . . . courts should not look back and try to compensate for the fact that the net effect of the payments may, in some cases, have resulted in the reduction of marital assets" … . Here, the plaintiff's payments toward the mortgage, which was satisfied in October 2017, were made prior to the commencement of this action, and thus, the plaintiff is not entitled to a credit for those payments. Cuomo v Moss, 2021 NY Slip Op 05945, Second Dept 11-3-21

Practice Point: A party in divorce proceedings is not entitled to credit for marital-residence mortgage payments made before termination of the marriage was contemplated.

FORECLOSURE, EVIDENCE.

IN COMPUTING THE AMOUNT OWED IN THIS FORECLOSURE ACTION, THE REFEREE RELIED ON AN AFFIDAVIT FROM A BANK EMPLOYEE WHICH DID NOT INCLUDE THE RELATED BUSINESS RECORDS; THE AFFIDAVIT THEREFORE WAS INADMISSIBLE HEARSAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's computation of the amount owed in this foreclosure action was not supported by the record. The affidavit of the bank's employee was based on business records which were not produced, rendering the affidavit hearsay:

Supreme Court should have denied the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale, and granted that branch of the defendants' cross motion which was to reject the referee's report. The referee's computations as to the amount due and owing to the plaintiff were not substantially supported by the record … . An affidavit of an assistant vice president of the plaintiff, which was submitted in support of the plaintiff's motion to establish the amount due and owing, constituted inadmissible hearsay and lacked probative value because the business records purportedly relied upon in making the calculations were not produced … . Bank of Am., N.A. v Barton, 2021 NY Slip Op 05939, Second Dept 11-3-21

Practice Point: If a referee in a foreclosure proceeding relies on an affidavit to which the relevant business records are not attached, the report is based on inadmissible hearsay.

INSURANCE LAW, BROKER LIABILTIY.

QUESTIONS OF FACT ABOUT WHETHER THE INSURED MADE A SPECIFIC REQUEST TO DEFENDANT INSURANCE-BROKER FOR COVERAGE AND WHETHER THERE WAS A SPECIAL RELATIONSHIP BETWEEN THE INSURED AND THE BROKER; THE BREACH OF CONTRACT CAUSE OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT; THE NEGLIGENT MISREPRESENTATION CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the defendant insurance-broker's motion for summary judgment on the breach of contract cause of action was properly denied, and the motion for summary judgment on the negligent misrepresentation cause of action should have been denied. The issues are whether the insured made a specific request for coverage and whether there was a special relationship between the insured and defendant broker:

"An insurance agent or broker has a common-law duty to obtain requested coverage for a client within a reasonable amount of time, or to inform the client of the inability to do so … . Generally, "'[t]o set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy'" … . "Thus, the duty is defined by the nature of the client's request" … . However, "[w]here a special relationship develops between the broker and client, . . . the broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage" … .

… [T]he defendant insurance broker failed to meet its initial burden of tendering sufficient evidence to demonstrate the absence of triable issues of fact with respect to whether the plaintiff client made a specific request for coverage which was not obtained … . … [T]riable issues of fact exist as to whether a specific interaction took place between the plaintiff and the defendant regarding a question of coverage related to the plaintiff's renovation work on the insured property that could give rise to a special relationship between the parties … . Copacabana Realty, LLC v A.J. Benet, Inc., 2021 NY Slip Op 05944, Second Dept 11-3-21

Practice Point: An insurance broker may be liable for failure to procure coverage if the insured made a specific request for that coverage and/or if there exists a special relationship between the broker and the insured.

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE.

DEFENDANT WAS NOT SHOWN TO BE NEGLIGENT OR TO HAVE EXERCISED SUPERVISION AND CONTROL OVER THE INJURY-PRODUCING WORK; SCHEDULING AND COORDINATING WORK DOES NOT CONSTITUTE SUPERVISON AND CONTROL; THE COMMON-LAW INDEMNIFICATION AND CONTRIBUTION CLAIMS SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the common-law indemnification action against defendant Ergonomic should have been granted because Ergonomic was not shown to be negligent or to have exercised supervisory control over the injury-producing work. Portions of the floor were removed to access cables. Plaintiff alleged a leg of his ladder went into an area where the floor had been removed, causing him to fall. The First Department noted that coordinating and scheduling work does not rise to the level of supervision and control:

Ergonomic's motion for summary judgment dismissing Owner Defendants' third-party claims for common-law indemnification and contribution should have been granted. There was no evidence that Ergonomic was negligent or that it exercised actual supervision or control over the injury-producing work. Ergonomic did not perform any of the physical work and was not onsite at the time of the accident. To the extent it might have had authority to supervise the injury producing work, it never exercised such authority, but rather, had subcontracted such contractual duties to Quick, which actually directed and supervised the work … . The fact that Ergonomic scheduled and coordinated Quick's and Atlas's work is insufficient to give rise to liability, as the coordinating and scheduling of trades at work sites do not rise to the level of supervision and control necessary to impose liability under a negligence theory … . Balcazar v Commet 380, Inc., 2021 NY Slip Op 06030, First Dept 11-4-21

Practice Point: Where liability for a worker's on-the-job injury depends upon whether the defendant supervised or controlled the injury-causing work, the mere fact the defendant coordinates and schedules work by contractors does not rise to the required level of supervision or control.

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

PLAINTIFF'S DECEDENT, A PATIENT IN DEFENDANT REHAB FACILITY, FELL WHEN WALKING UNATTENDED BACK TO HIS BED FROM THE BATHROOM; PLAINTIFF ALLEGED THE FAILURE TO PROVIDE A BED ALARM WAS A PROXIMATE CAUSE; THAT CAUSE OF ACTION SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE; DEFENDANT'S SUMMARY JUDGMENT MOTION WAS PROPERLY GRANTED BECAUSE PLAINTIFF DID NOT SUBMIT EXPERT EVIDENCE IN OPPOSITION (WHICH WOULD NOT HAVE BEEN REQUIRED IF THE CAUSE OF ACTION SOUNDED IN NEGLIGENCE, AS THE MOTION COURT HAD HELD) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the cause of action at issue sounded in medical malpractice, not negligence. Therefore, to avoid summary judgment, plaintiff was required to submit expert opinion evidence in opposition. Plaintiff's decedent, a patient in a rehabilitation facility (defendant St. James), fell when walking unattended after going to the bathroom. Plaintiff alleged defendant's failure to provide decedent with a bed alarm was a proximate cause of the fall. The motion court held that cause of action sounded in negligence and raised a jury question:

The essence of the allegation that St. James improperly failed to provide the decedent with a bed alarm which would have prevented his fall is that it improperly assessed his condition and the degree of supervision necessary to prevent him from falling, which sounds in medical malpractice … . Thus, with respect to this allegation, St. James bore the initial burden of establishing either that there was no departure from good and accepted medical practice or that any departure was not a proximate cause of the decedent's injuries … .

In response to St. James' prima facie showing of entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact by submitting an expert opinion that specifically addressed the defense expert's assertions … . Accordingly, the Supreme Court should have granted that branch of St. James' motion which was for summary judgment dismissing so much of the complaint as alleged a failure to provide the decedent with a bed alarm. Losak v St. James Rehabilitation & Healthcare Ctr., 2021 NY Slip Op 05961, Second Dept 11-3-21

Practice Point: Here the motion court considered the elderly patient's fall while walking unattended to sound in negligence. Therefore, the motion court held, expert evidence was not required. The appellate court held the action sounded in medical malpractice and dismissed it because no expert evidence was submitted.

MUNICIPAL LAW, NEGLIGENCE, EVIDENCE.

PLAINTIFF'S DECEDENT WAS KILLED BY A DRIVER WHO WAS BEING PURSUED BY THE POLICE; THE POLICE DEPARTMENT'S INTERNAL RULES IMPOSED A HIGHER STANDARD OF CARE FOR POLICE-CHASES THAN THE VEHICLE AND TRAFFIC LAW; THE JURY SHOULD HAVE BEEN TOLD THE INTERNAL RULES COULD BE CONSIDERED ONLY AS SOME EVIDENCE OF NEGLIGENCE; PLAINTIFF'S JUDGMENT REVERSED AND NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing the plaintiff's judgment after trial and ordering a new trial in this traffic accident case, determined the defendant police department's internal police-chase rules should not have been admitted in evidence without a limiting instruction explaining the rules could be considered as some evidence of negligence. The internal rules imposed a higher standard of care for police-chases than the reckless-disregard standard imposed by the Vehicle and Traffic Law. Plaintiff's decedent was killed by a driver who was being pursued by the police. The jury found both the driver and the police negligent:

The Suffolk County defendants are correct that the Supreme Court erred in admitting into evidence, without any limiting instruction, the Suffolk County Police

Department Rules and Procedures on vehicular pursuits. An organization's internal rules or manuals, "to the extent they impose a higher standard of care than is imposed by law, are inadmissible to establish" a violation of the standard of care … .

Here, the rules and regulations at issue imposed a higher standard of care than the reckless disregard standard imposed by Vehicle and Traffic Law § 1104, which "'qualifiedly exempts drivers of emergency vehicles from certain traffic laws when they are involved in an emergency operation, and precludes the imposition of liability for otherwise privileged conduct except where the driver acted in reckless disregard for the safety of others'" … . Thus, we conclude that the Supreme Court committed reversible error in admitting the internal rules without providing a limiting instruction that the rules could be considered only as some evidence of recklessness along with other factors … . Foster v Suffolk County Police Dept., 2021 NY Slip Op 05956, Second Dept 11-3-21

Practice Point: If a police department's internal rules impose a higher standard of care on police-chases than does the Vehicle and Traffic Law, the jury must be instructed that the rules constitute only "some evidence of negligence." Failure to so instruct the jury will necessitate a new trial.

WORKERS' COMPENSATION, EVIDENCE.

THE WORKERS' COMPENSATION BOARD ABUSED ITS DISCRETION BY IGNORING UNCONTRADICTED EVIDENCE OF THE EXTENT OF CLAIMANT'S IMPAIRMENT (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the uncontested evidence demonstrated claimant's shoulder was 35% impaired, not 15% impaired as found by the Board:

Whether to grant an application for reopening or rehearing in the interest of justice is a matter left to the Board's discretion and our review of that decision is limited to whether there was an abuse of that discretion … . Upon our review of the Board's decision, we find that such discretion was abused here. Although the C-4.3 form notes that claimant's left shoulder is 15% impaired, it directs that the orthopedic

surgeon's findings are set forth in the attached medical narrative. The substance of the attached medical narrative clearly sets forth in detail that claimant sustained a 35% SLU of the left shoulder — attributing 15% to full thickness rotator cuff tear, 10% distal clavicle excision and 10% mild loss of internal and external rotation. The carrier, who received the medical narrative along with the C-4.3 form, specifically accepted the medical opinion without objection. "Notably, while the Board is free to reject the opinion of an expert where it finds such to be unconvincing or incredible, it may not reject an uncontradicted opinion that is properly rendered" … . Matter of Taylor v Buffalo Psychiatric Ctr., 2021 NY Slip Op 06021, Third Dept 11-4-21

Practice Point: The Workers' Compensation Board cannot ignore uncontradicted expert evidence of the extent of the worker's impairment.

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