

NEW YORK APPELLATE DIGEST, LLC

The Significant Decisions Addressing Civil Procedure Released by Our New York State Appellate Courts in December 2021, Distilled to Succinct Practice Points. The Entries in the Table of Contents Link to the Practice Points 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 Newsletter.
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Civil Procedure
Practice Newsletter

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[AMEND ANSWER, WORKERS’ COMPENSATION, LABOR LAW- CONSTRUCTION LAW, EMPLOYMENT LAW.](#)

[DEFENDANT EMPLOYER’S LATE MOTION TO AMEND THE ANSWER IN THIS LABOR LAW 240 \(1\) ACTION TO ASSERT THAT PLAINTIFF’S EXCLUSIVE REMEDY WAS THE WORKER’S COMPENSATION BENEFITS ALREADY AWARDED SHOULD HAVE BEEN GRANTED \(FIRST DEPT\).](#)

[Chen v 111 Mott LLC, 2021 NY Slip Op 07501, First Dept 12-28-21](#)

Practice Point: Workers’ Compensation may be a worker’s only remedy re: his/her employer.

ANONYMOUS CAPTION.

DEFENDANT’S MOTION TO COMPEL PLAINTIFF, WHO SUED UNDER THE NAME MARGARET DOE, TO AMEND THE CAPTION TO INCLUDE HER LEGAL NAME SHOULD NOT HAVE BEEN GRANTED; PLAINTIFF PRESENTED EVIDENCE SUING UNDER HER OWN NAME WOULD HAVE SEVERE MENTAL-HEALTH CONSEQUENCES (FIRST DEPT).

[Doe v Bloomberg L.P., 2021 NY Slip Op 06754, First Dept 12-2-21](#)

Practice Point: A plaintiff will be allowed to sue anonymously (using “Margaret Doe” in the caption, for example) if he/she can demonstrate suing under his/her legal name will have severe mental health consequences.

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

THE REQUIREMENTS FOR AN APPEALABLE ORDER IN A SORA RISK-LEVEL PROCEEDING EXPLAINED (THIRD DEPT).

[People v Lane, 2021 NY Slip Op 07324, Third Dept 12-23-21](#)

Practice Point: A written order served on the defendant is a prerequisite for an appeal of a SORA risk-level determination.

APPEALS, SERVICE OF PROCESS.

THE ORDER ISSUED AFTER A TRAVERSE HEARING FINDING DEFENDANTS WERE NOT PROPERLY SERVED IS APPEALABLE PURSUANT TO CPLR 5501 (C); THE ORDER BRINGS UP FOR APPEAL WHETHER THE TRAVERSE HEARING WAS NECESSARY; THE MAJORITY CONCLUDED THE HEARING WAS NOT NECESSARY; THERE WAS AN EXTENSIVE DISSENT (SECOND DEPT).

[OneWest Bank FSB v Perla, 2021 NY Slip Op 07550, Second Dept 12-29-21](#)

Practice Point: An order issued after finding defendant was not properly served brings up for appeal whether the traverse hearing was necessary in the first place.

ARBITRATION, MECHANIC'S LIENS.

THE MOTION TO DISMISS THE ARBITRATION IN THIS ACTION ALLEGING NONPAYMENT FOR CONSTRUCTION WORK SHOULD NOT HAVE BEEN GRANTED; THE ARBITRATOR RULES ON PAYMENT FOR LABOR AND MATERIALS; COURTS RULE ON THE VALIDITY OF MECHANIC'S LIENS (FIRST DEPT).

[Flowcon, Inc. v Andiva LLC, 2021 NY Slip Op 06756, First Dept 12-2-21](#)

Practice Point: Here the arbitrator's rulings on payment for labor and materials in this construction dispute are conclusive on the parties, but any rulings on the validity of mechanic's liens are not conclusive.

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ATTORNEYS, GENDER DISCRIMINATION, HUMAN RIGHTS LAW, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

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[Petty v Law Off. of Robert P. Santoriella, P.C., 2021 NY Slip Op 07527, First Dept 12-28-21](#)

Practice Point: An attorney's withholding requested services from a client may constitute discrimination under the NYS Human Rights Law.

BANKRUPTCY, CLAIMS ARISING AFTER BANKRUPTCY FILING.

A CLAIM WHICH ARISES AFTER THE FILING OF A BANKRUPTCY PETITION BELONGS TO THE DEBTOR, NOT TO THE BANKRUPTCY ESTATE (FIRST DEPT).

[Moncho v Miller, 2021 NY Slip Op 06960, First Dept 12-14-21](#)

Practice Point: A claim which arises after a bankruptcy petition is filed belongs to the debtor, not the bankruptcy estate.

CLASS ACTIONS, CONTRACT LAW, UTILITIES, POWER OUTAGES.

THE CLASS—LONG ISLAND POWER AUTHORITY (LIPA) CUSTOMERS AFFECTED BY POWER OUTAGES CAUSED BY HURRICANE SANDY— SHOULD NOT HAVE BEEN CERTIFIED (SECOND DEPT).

[Matter of Long Is. Power Auth. Hurricane Sandy Litig. v Long Is. Power Auth., 2021 NY Slip Op 07545, Second Dept 12-29-21](#)

Practice Point: When there are too many factual differences in how members of a class are affected by the acts or omissions of a defendant, class certification will not fly.

COMPLAINTS, CHILD VICTIMS ACT, SCANDALOUS OR PREJUDICIAL MATTER.

GUIDELINES FOR FUTURE CHILD VICTIMS ACT COMPLAINTS WHERE DEFENDANT MOVES TO STRIKE “SCANDALOUS OR PREJUDICIAL MATTER” (SECOND DEPT).

[Pisula v Roman Catholic Archdiocese of N.Y., 2021 NY Slip Op 06872, Second Dept 12-8-21](#)

Practice Point: This decision should be consulted before composing a Child Victims Act complaint to make sure the allegations are not vulnerable to a motion to strike scandalous and prejudicial matter.

DEBTOR-CREDITOR, SEIZURE OF PROPERTY, DEBTOR'S REMEDIES.

A JUDGMENT DEBTOR CANNOT BRING AN ACTION IN TORT AGAINST THE CREDITOR OR THE MARSHAL ALLEGING DAMAGES STEMMING FROM THE SEIZURE OF PROPERTY TO BE APPLIED TO THE DEBT; THE JUDGMENT DEBTOR'S REMEDIES ARE CONFINED TO THOSE DESCRIBED IN CPLR 5239 AND 5240 (CT APP).

[Plymouth Venture Partners, II, L.P. v GTR Source, LLC, 2021 NY Slip Op 07055, CtApp 12-16-21](#)

Practice Point: A judgment debtor cannot bring an action in tort stemming from the seizure of the debtor's property by the creditor and/or the marshal. CPLR 5230 & 5240 provide the only available remedies.

FAMILY LAW, CUSTODY, ARBITRATION, CONTRACT LAW.

CUSTODY MATTERS ARE NOT SUBJECT TO ARBITRATION, DESPITE A PROVISION TO THAT EFFECT IN THE STIPULATION OF SETTLEMENT (SECOND DEPT).

[Matsui v Matsui, 2021 NY Slip Op 06843, Second Dept 12-8-21](#)

Practice Point: Custody is not subject to arbitration, even if a stipulation of settlement in a divorce proceeding purports to authorize it.

FAMILY LAW, JURISDICTION, FAMILY OFFENSE, AGE OF COMPLAINANT.

THE FACT THAT COMPLAINANT TURNED 21 DURING THE FAMILY OFFENSE HEARING DID NOT DEPRIVE FAMILY COURT OF JURISDICTION; NOR DID THE INCAPACITY OF THE COMPLAINANT (SECOND DEPT).

[Matter of Vellios v Vellios, 2021 NY Slip Op 07276, Second Dept 12-22-21](#)

Practice Point: The fact that the complainant in this family offense proceeding turned 21 or was incapacitated did not deprive Family Court of subject matter jurisdiction.

FAMILY LAW, STATUTE OF LIMITATIONS, STIPULATION OF SETTLEMENT.

PLAINTIFF SOUGHT ARREARAGES FOR A PORTION OF DEFENDANT'S PENSION UNDER THE TERMS OF THE STIPULATION OF SETTLEMENT WHICH WAS INCORPORATED BUT NOT MERGED INTO THE JUDGMENT OF DIVORCE; THE ACTION WAS THEREFORE IN THE NATURE OF A BREACH OF CONTRACT AND WAS LIMITED BY THE SIX-YEAR STATUTE OF LIMITATIONS (FOURTH DEPT).

[Mussmacher v Mussmacher, 2021 NY Slip Op 07413, Fourth Dept 12-23-21](#)

Practice Point: An action pursuant to a stipulation of settlement which is incorporated in but not merged with a judgment of divorce is in the nature of a breach of contract subject to a six-year statute of limitations.

FORECLOSURE, VACATION OF STIPULATION OF DISCONTINUANCE.

WHERE A FORECLOSURE ACTION IS TERMINATED BY A STIPULATION OF DISCONTINUANCE WITH PREJUDICE, THE STIPULATION CANNOT BE VACATED BY A MOTION, A PLENARY ACTION MUST BE BROUGHT (SECOND DEPT).

[Deutsche Bank Natl. Trust Co. v Goltz, 2021 NY Slip Op 06671, Second Dept 12-1-21](#)

Practice Point: In a matter, here a foreclosure, which is terminated by a stipulation of discontinuance with prejudice, the stipulation can only be vacated by bringing a plenary action, a motion to vacate will not fly.

FORUM NON CONVENIENS.

THIS ACTION INVOLVED THE NAZIS' CONFISCATION OF A DEGAS PAINTING OWNED BY A GERMAN CITIZEN WHO SUBSEQUENTLY MOVED TO SWITZERLAND AND THEN FRANCE; SUPREME COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE ACTION ON FORUM NON CONVENIENS GROUNDS (CT APP).

[Estate of Kainer v UBS AG, 2021 NY Slip Op 07056, CtApp 12-16-21](#)

Practice Point: Whether the forum non conveniens doctrine should be applied is ordinarily a matter of discretion, not a question of law. As long as all the relevant factors are considered by the court, the discretion will not be deemed to have been abused.

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INSURANCE LAW, CONTRACT LAW, CHOICE OF FORUM, CHOICE OF LAW.

THE INSURED, SPACE NEEDLE, LLC, IS LOCATED IN WASHINGTON STATE; ALTHOUGH THE INSURANCE POLICY NAMED NEW YORK AS THE FORUM AND REQUIRED THE APPLICATION OF NEW YORK LAW FOR ANY LAWSUITS, THE WASHINGTON INSURANCE CODE RENDERED SUCH PROVISIONS VOID; THEREFORE THE INSURER WAS NOT ENTITLED TO AN ANTI-SUIT PRELIMINARY INJUNCTION IN NEW YORK (FIRST DEPT).

[North Am. Elite Ins. Co. v Space Needle, LLC, 2021 NY Slip Op 06769, First Dept 12-2-21](#)

Practice Point: Despite the language in the insurance policy naming New York as the forum and requiring the application of New York law, the statute in the insured's home state declaring such insurance-policy provisions void made it unlikely an anti-suit injunction would be issued in New York. Therefore the insurer's application for a preliminary injunction in New York prohibiting suit by the insured was denied. The out-of-state insured claimed business-loss due to COVID.

JUDGES, ADDING A PARTY, FAMILY LAW.

FAMILY COURT DID NOT HAVE THE AUTHORITY TO, SUA SPONTE, ADD A PARTY TO THIS PATERNITY PROCEEDING; APPLICABLE LAW EXPLAINED (THIRD DEPT).

[Matter of Schenectady County Dept. of Social Servs. v Noah DD., 2021 NY Slip Op 07587, Third Dept 12-30-21](#)

Practice Point: Absent a motion from a party, a judge cannot add a party to the proceeding.

JUDGES, SUA SPONTE AMENDMENT OF ORDER, FAMILY LAW.

FAMILY COURT DID NOT HAVE THE AUTHORITY TO, SUA SPONTE, AMEND A DISMISSAL ORDER FROM “WITHOUT PREJUDICE” TO “WITH PREJUDICE” (THIRD DEPT).

[Matter of Brian W. v Mary X., 2021 NY Slip Op 07332, Third Dept 12-23-21](#)

Practice Point: Judges do not have the authority to change the substance of an order without a motion from a party. Here the sua sponte change from “with prejudice” to “without prejudice” was not authorized.

JUDGES, PRE-ANSWER MOTION TO DISMISS, PREMATURE RULING.

ALTHOUGH THE PRE-ANSWER MOTION TO DISMISS THE ARTICLE 78 PETITION WAS PROPERLY DENIED, THE COURT SHOULD NOT HAVE GRANTED THE PETITION WITHOUT AFFORDING THE RESPONDENTS THE OPPORTUNITY TO ANSWER IT (FOURTH DEPT).

[Mintz v City of Rochester, 2021 NY Slip Op 07389, Fourth Dept 12-23-21](#)

Practice Point: A judge’s denial of a pre-answer motion to dismiss an Article 78 petition does not allow the judge to grant the petition before the respondent answers it.

JURISDICTION, FAMILY LAW, CUSTODY.

FAMILY COURT SHOULD NOT HAVE DETERMINED, WITHOUT A HEARING, THAT NEW YORK DID NOT HAVE JURISDICTION OVER THIS CUSTODY MATTER OR THAT NEW YORK WAS AN INCONVENIENT FORUM; MOTHER HAD RELOCATED TO HAWAII WITH THE CHILDREN (SECOND DEPT).

[Matter of Sutton v Rivera, 2021 NY Slip Op 07548, Second Dept 12-29-21](#)

Practice Point: Whenever facts are disputed, a hearing is required. This species of error comes up a lot in Family Court cases.

JURORS, SUBSTITUTION OF ALTERNATE JUROR, CONSTITUTIONAL LAW, NEGLIGENCE.

WHEN SUBSTITUTING AN ALTERNATE JUROR AFTER DELIBERATIONS HAVE BEGUN, THE JURY MUST BE INSTRUCTED TO START THE DELIBERATIONS OVER AND DISREGARD THE PRIOR DELIBERATIONS; THE OVER \$14 MILLION PLAINTIFF'S VERDICT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN SET ASIDE (SECOND DEPT).

[Caldwell v New York City Tr. Auth., 2021 NY Slip Op 07537, Second Dept 12-29-21](#)

Practice Point: A plaintiff in a civil jury trial is entitled under the NY Constitution to a verdict by a six-member jury. If an alternative juror is substituted after deliberations have started and the jury doesn't start over from scratch, that constitutional right is violated.

LABOR LAW-CONSTRUCTION LAW, SUMMARY JUDGMENT, PRIMA FACIE CASE, EVIDENCE.

PLAINTIFF IN A LABOR LAW 240 (1) AND 241 (6) ACTION NEED NOT SUBMIT AN AFFIDAVIT TO MAKE OUT A PRIMA FACIE CASE; THE HEARSAY STATEMENTS REFERENCING OR ATTRIBUTED TO PLAINTIFF DID NOT RAISE A QUESTION OF FACT (FIRST DEPT).

[Greca v Choice Assoc. LLC, 2021 NY Slip Op 06759, First Dept 12-2-21](#)

Practice Point: At the summary judgment stage, a plaintiff in a Labor Law 240(1) action need not submit an affidavit to make out a prima facie case.

Practice Point: In a Labor Law 240(1) action, hearsay statements in medical records which do not relate to diagnosis and treatment and are not directly attributable to plaintiff will not defeat plaintiff's motion for summary judgment. In addition, hearsay statements which do not qualify as admissions will not defeat plaintiff's motion for summary judgment.

NECESSARY PARTIES, MUNICIPAL LAW.

THE NYC WATER BOARD DETERMINED PETITIONER WAS NOT ENTITLED TO A RETROACTIVE REDUCTION IN SEWER CHARGES BUT WAS NOT NAMED AS A RESPONDENT IN PETITIONER'S ARTICLE 78 ACTION; THE WATER BOARD MUST BE ADDED AS A NECESSARY PARTY (SECOND DEPT).

[Matter of A&F Scaccia Realty Corp. v New York City Dept. of Env'tl. Protection, 2021 NY Slip Op 06995, Second Dept 12-15-21](#)

Practice Point: Where the action by a city agency, here the NYC Water Board, is the subject of an Article 78 proceeding, the agency is a necessary party.

PREEMPTION, NEGLIGENCE, PRODUCTS LIABILITY, MEDICAL MALPRACTICE.

THE PRODUCTS LIABILITY AND BREACH OF WARRANTY CAUSES OF ACTION ALLEGING THE FAILURE OF AN IMPLANTED MEDICAL DEVICE WHICH ASSISTS THE HEART WERE PREEMPTED BY FEDERAL LAW; THE CAUSES OF ACTION ALLEGING NEGLIGENCE ON THE PART OF THE ENGINEERS WHO REPLACED THE LEAD TO THE DEVICE WERE NOT PREEMPTED (SECOND DEPT).

Arnold v Lanier, 2021 NY Slip Op 06666, Second Dept 12-1-21

Practice Point: Federal law preempts products liability actions stemming from implanted medical devices, but does not preempt negligence actions stemming from the repair of such devices. Here engineers replaced a lead to the implanted device during the surgical procedure. The action against the engineers was not preempted by the federal Medical Device Amendments of 1976 (MDA).

Practice Point: A motion to vacate a default judgment based upon late submission of papers opposing a summary judgment should be granted if the delay was not long, it was not willful, the other party was not prejudiced, and the defense is meritorious.

PRIVILEGE, WAIVER.

SILENCE DOES NOT CONSTITUTE WAIVER; HERE THE NONPARTY DID NOT EXPRESSLY WAIVE THE COMMON INTEREST, WORK PRODUCT OR TRIAL PREPARATION PRIVILEGES WITH RESPECT TO SUBPOENAED DOCUMENTS (FIRST DEPT).

[Homapour v Harounian, 2021 NY Slip Op 07080, First Dept 12-21-21](#)

Practice Point: Here silence did not constitute a waiver of common interest, work product or trial preparation privileges with respect to subpoenaed documents.

PRIVILEGE, MEDICAL MALPRACTICE, “QUALITY ASSURANCE” PROCEEDINGS, PRIVILEGE, EDUCATION-SCHOOL LAW, PUBLIC HEALTH LAW.

WHERE THE MINUTES OF A “QUALITY ASSURANCE” PEER-REVIEW COMMITTEE MEETING ASSESSING THE MEDICAL TREATMENT AFFORDED A PATIENT DO NOT IDENTIFY THE SPEAKERS, THE PARTY-STATEMENT EXCEPTION TO THE PUBLIC HEALTH LAW AND EDUCATION LAW PRIVILEGE APPLIES, MAKING ALL THE STATEMENTS BY UNIDENTIFIED SPEAKERS SUBJECT TO DISCOVERY BY THE PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION (SECOND DEPT).

[Siegel v Snyder, 2021 NY Slip Op 07264, Second Dept 12-22-21](#)

Practice Point: A “quality assurance” proceeding held by a healthcare provider to assess the treatment provided by its personnel is generally privileged except for statements made by a party to a lawsuit. In this case, the minutes of the proceeding did not identify the speakers and the court applied the party-statement exception to the privilege to the entire proceeding. All the statements made by unidentified participants were deemed discoverable by the plaintiff.

SERVICE OF PROCESS, APPEARANCE, LACK OF JURISDICTION DEFENSE, INFANTS, FORECLOSURE.

A CROSS-MOTION TO DISMISS THE COMPLAINT PURSUANT TO CPLR 3215 (C) IS NOT AN APPEARANCE AND DOES NOT WAIVE THE LACK-OF-JURISDICTION DEFENSE; INFANT DEFENDANT IN THIS FORECLOSURE ACTION WAS NOT SERVED IN ACCORDANCE WITH CPLR 309; THE COMPLAINT SHOULD HAVE BEEN DISMISSED FOR LACK OF PERSONAL JURISDICTION (SECOND DEPT)

[US Bank N.A. v McGown, 2021 NY Slip Op 06879, Second Dept 12-8-21](#)

Practice Point: A cross-motion to dismiss a complaint pursuant to CPLR 3215 (c) is not an appearance and therefore does not waive a lack-of-jurisdiction defense.

Practice Point: The requirements of service of process on an infant in CPLR 308 and 309 must be complied with to establish jurisdiction over the infant.

STATUTE OF LIMITATIONS, ACCRUAL UPON ACQUITTAL CONTRACT LAW, CONVERSION, FIDUCIARY DUTY, FRAUD.

PLAINTIFF WAS ACQUITTED OF CHARGES STEMMING FROM THE ALLEGED APPROPRIATION OF INSURANCE PROCEEDS DUE OTHER BENEFICIARIES AND THEN SUED TWO INSURANCE COMPANIES; THE CAUSES OF ACTION FOR BREACH OF CONTRACT, CONVERSION AND BREACH OF FIDUCIARY DUTY DID NOT ACCRUE UPON ACQUITTAL AND WERE THEREFORE TIME-BARRED (FOURTH DEPT).

[Morrow v Brighthouse Life Ins. Co. of NY, 2021 NY Slip Op 07373, Fourth Dept 12-23-21](#)

Practice Point: The statutes of limitations for the causes of action for malicious prosecution and legal malpractice were triggered by the acquittal of the underlying criminal charges, but the statutes of limitations for breach of contract, breach of fiduciary duty and conversion were not. Those causes of action were therefore time-barred here.

STATUTE OF LIMITATIONS, CRIMINAL LAW, CIVIL SUITS BY VICTIMS.

THE EXTENSION OF THE STATUTE OF LIMITATIONS IN CPLR 213-B(1) WHICH ALLOWS A VICTIM OF A CRIME TO SUE THE PERPETRATOR WITHIN SEVEN YEARS OF THE DATE OF CRIME APPLIES ONLY WHERE THE PERPETRATOR HAS BEEN “CONVICTED OF [THE] CRIME;” A PERPETRATOR WHO HAS BEEN ADJUDICATED A YOUTHFUL OFFENDER HAS NOT BEEN “CONVICTED OF A CRIME” WITHIN THE MEANING OF CPLR 213-B(1) (SECOND DEPT).

[Pitt v Feagles, 2021 NY Slip Op 07299, Second Dept 12-22-21](#)

Practice Point: The extended seven-year statute of limitations for actions by victims of sex offenders is triggered by the “conviction” of the sex offender. Here

the defendant was adjudicated a youthful offender. Therefore the seven-year extension did not apply.

STATUTE OF LIMITATIONS, ACCELERATION OF DEBT, DEBTOR-CREDITOR.

IF A DEBT IS ACCELERATED, THE SIX-YEAR STATUTE OF LIMITATIONS FOR RECOVERY OF THE DEBT IS TRIGGERED; IF THE DEBT IS NOT ACCELERATED, THE INSTALLMENTS DUE WITHIN THE SIX YEARS PRIOR TO COMMENCING SUIT ARE RECOVERABLE (THIRD DEPT).

DiCenzo v Mone, 2021 NY Slip Op 06734, Third Dept 12-2-21

Practice Point: Acceleration of a debt (calling the whole debt in) starts the six-year statute of limitations for commencing suit. If the debt is not accelerated, only the unpaid installments which came due in the six years before the suit was commenced are recoverable.

STATUTE OF LIMITATIONS, REAL PROPERTY LAW, EASEMENT BY NECESSITY, MUNICIPAL LAW.

THE OWNER OF THE OLD BRONX COURTHOUSE HAS A VALID CAUSE OF ACTION SEEKING AN EASEMENT BY NECESSITY OVER THE SIDEWALK/STREET ABUTTING THE COURTHOUSE, DESPITE THE “DEMAPPING” OF THE ABUTTING STREET AND THE CONVEYANCE OF THE “DEMAPPED” STREET TO THE DEFENDANT; THE ACTION IS NOT PRECLUDED BY THE STATUTE OF LIMITATIONS BECAUSE IT SEEKS TO QUIET TITLE TO THE OWNER’S LAND (FIRST DEPT).

[Liberty Sq. Realty Corp. v The Doe Fund, Inc., 2021 NY Slip Op 07082, First Dept 12-21-21](#)

Practice Point: Access to a building over property deeded to another may be allowed pursuant to an easement by necessity.

Practice Point: With respect to the statute of limitations, a property owner may wait until its possession is disturbed or its title is attacked to take steps to quiet title.

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STATUTE OF LIMITATIONS, TRUSTS AND ESTATES, REPUDIATION OF FIDUCIARY DUTY.

ALTHOUGH THE TRUSTEE DID NOT PROVIDE AN ACCOUNTING, HE NEVER REPUDIATED HIS FIDUCIARY DUTIES; THEREFORE THE SIX-YEAR STATUTE OF LIMITATIONS FOR AN ACCOUNTING WAS NOT TRIGGERED (FOURTH DEPT).

[Massey-Hughes v Massey, 2021 NY Slip Op 07405, Fourth Dept 12-23-21](#)

Practice Point: The six-year statute of limitations for an accounting re: a trust is triggered by the trustee's open repudiation of his or her fiduciary duties. Merely refusing to provide an accounting is not such an open repudiation.

SUBJECT MATTER JURISDICTION, FAMILY LAW, INTIMATE RELATIONSHIP.

PETITIONER'S WAIVER OF HER RIGHT TO COUNSEL IN THIS FAMILY COURT ACT ARTICLE 8 PROCEEDING WAS NOT DEMONSTRATED TO HAVE BEEN VOLUNTARY; THE COURT SHOULD HAVE HELD A HEARING ON WHETHER THE RESPONDENT AND PETITIONER HAD BEEN IN AN INTIMATE RELATIONSHIP (THEREBY AFFORDING THE COURT SUBJECT MATTER JURISDICTION) (SECOND DEPT).

[Matter of Minor v Birkenmeyer, 2021 NY Slip Op 07546, Second Dept 12-29-21](#)

Practice Point: Making sure a waiver of the right to counsel is knowing, intelligent and voluntary is just as important in Family Court as in criminal cases.

TAX ESTOPPEL, TAX FORMS.

PURSUANT TO THE DOCTRINE OF TAX ESTOPPEL, TAX FORMS SIGNED BY DECEDENT INDICATING PROPERTY WAS TRANSFERRED WITHOUT CONSIDERATION PRECLUDED THE CONSTRUCTIVE TRUST CAUSE OF ACTION BASED UPON AN ALLEGED PROMISE TO PAY PETITIONERS PROCEEDS FROM THE SALE (FIRST DEPT).

[Matter of Chimsanthia, 2021 NY Slip Op 06796, First Dept 12-7-21](#)

Practice Point: A party may be estopped from making a claim which is contradicted by a tax document under the doctrine of tax estoppel. Here the tax document indicated property was transferred without consideration. Therefore the claim of entitlement to the proceeds of the sale of the property was precluded.

VACCINES, APPEALS, DECLARATORY JUDGMENTS, PUBLIC HEALTH LAW, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

AN APPELLATE COURT HAS THE POWER TO CONSIDER A REQUEST FOR A DECLARATORY JUDGMENT WHICH WAS NOT BEFORE THE MOTION COURT; THE REGULATION MANDATING CERTAIN VACCINES DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE OR EXCEED THE REGULATORY POWERS OF THE NYS DEPARTMENT OF HEALTH (FOURTH DEPT).

[Matter of Kerri W.S. v Zucker, 2021 NY Slip Op 07349, Fourth Dept 12-23-21](#)

Practice Point: The NYS Department of Health has the authority to mandate certain vaccines.

Practice Point: An appellate court may determine a request for a declaratory judgment which was not raised in the motion court below.

VENUE, CORPORATION LAW, VENUE, PRINCIPAL PLACE OF BUSINESS.

DEFENDANT ALLEGED ITS PRINCIPAL PLACE OF BUSINESS WAS IN NASSAU COUNTY BUT NEVER AMENDED ITS CERTIFICATE OF INCORPORATION WHICH DESIGNATED ITS PRINCIPAL PLACE OF BUSINESS AS QUEENS COUNTY; DEFENDANT’S MOTION TO CHANGE THE VENUE OF THIS SLIP AND FALL CASE FROM QUEENS TO NASSAU COUNTY SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

[Green v Duga, 2021 NY Slip Op 06990, Second Dept 12-15-21](#)

Practice Point: Here the corporation had never amended its certificate of incorporation to indicate its principal place of business was in Nassau County. Therefore the corporation’s motion to change venue from Queens to Nassau was properly denied.

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