

NEW YORK APPELLATE DIGEST, LLC

Selected Decisions (Mostly Reversals and Decisions with Dissents) Released by Our New York State Appellate Courts the Week of January 3 – 7, 2022, Distilled to Succinct Practice Points (One or Two Sentences Each). 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 the Newsletter.
Copyright 2022 New York Appellate Digest, LLC

Weekly Reversal
Newsletter
January 3 – 7, 2022

Contents

APPEALS, CIVIL PROCEDURE, JUDGES.....	4
IN THIS ARTICLE 78 PROCEEDING, NO APPEAL LIES FROM A JUDGE’S DECLINING TO SIGN AN ORDER TO SHOW CAUSE; THE ONLY REMEDY IS A MOTION TO VACATE THE FINAL JUDGMENT (FIRST DEPT).....	4
APPEALS, CRIMINAL LAW, EVIDENCE.....	4
CRIMINAL SALE OF A CONTROLLED SUBSTANCE FIRST DEGREE AND THE RELATED CONSPIRACY CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE (THIRD DEPT).....	4
APPEALS, FORECLOSURE, CIVIL PROCEDURE, JUDGES.	5
ALTHOUGH THE MOTION TO DISMISS THE FORECLOSURE ACTION AS ABANDONED PURSUANT TO CPLR 3215 WAS DENIED ON A GROUND NOT RAISED BY THE PARTIES, THE ORDER WAS SELF-PRESERVED AND APPEALABLE; THE PRESENTATION OF AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFENDANT’S DEFAULT PRECLUDES A FINDING THAT THE ACTION WAS ABANDONED PURSUANT TO CPLR 3215, DESPITE THE MOTION COURT’S REJECTION OF THE ORDER AS INCOMPLETE (SECOND DEPT).....	5
ATTORNEYS, PRIVILEGE, CIVIL RIGHTS LAW, DEFAMATION.	5
THE PRIVILEGE AFFORDED ATTORNEYS UNDER THE CIVIL RIGHTS LAW RE: ALLEGEDLY DEFAMATORY CLAIMS INCLUDED IN A COMPLAINT (WITH ONE EXCEPTION NOT APPLICABLE HERE) IS ABSOLUTE, EVEN IN THE FACE OF ALLEGATIONS OF MALICE AND BAD FAITH (FIRST DEPT).	5
CONDOMINIUMS, ASSOCIATIONS.	6
THE CONDOMINIUM BOARD OF MANAGERS PROPERLY APPLIED THE BUSINESS JUDGMENT RULE WHEN IT AUTHORIZED CONSTRUCTION WHICH NARROWED PLAINTIFF’S BOAT SLIP; THE DISSENT ARGUED THE BOARD FAILED TO SHOW THAT IT ACTED IN ACCORDANCE WITH THE CONDOMINIUM BYLAWS, WHICH IS REQUIRED BY THE BUSINESS JUDGMENT RULE (SECOND DEPT).....	6
CONTRACT LAW, UNIFORM COMMERCIAL CODE.	6
DEFENDANT PROPERLY REJECTED THE MACHINES AS NONCONFORMING GOODS, PLAINTIFF DID NOT CURE THE NONCONFORMITY, AND DEFENDANT WAS ENTITLED TO CONSEQUENTIAL DAMAGES AND LOST PROFITS (SECOND DEPT).	6
CONTRACT LAW.	7
BECAUSE PLAINTIFF ALLEGED THE ORAL CONTRACT WAS ENFORCEABLE EVEN IF THE TRIGGERING EVENT OCCURRED AFTER A YEAR, THE CONTRACT WAS WITHIN THE STATUTE OF FRAUDS AND THEREFORE MUST IN BE WRITING (FIRST DEPT).	7

Table of Contents

CRIMINAL LAW, JURORS. 7

THE JUROR’S SIMULATION OF THE STABBING IN THE JURY ROOM DID NOT CONSTITUTE JUROR MISCONDUCT (FIRST DEPT). 7

CRIMINAL LAW, JUDGES. 8

THE MAJORITY CONCLUDED THE INTERVENTION BY THE TRIAL JUDGE DID NOT DEPRIVE DEFENDANT OF A FAIR TRIAL; STRONG TWO-JUSTICE DISSENT (SECOND DEPT). 8

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA). 8

THE UNLAWFUL SURVEILLANCE CONVICTION DID NOT INVOLVE “SEXUAL CONTACT” AS DEFINED BY THE PENAL LAW; THEREFORE THE 20 POINT ASSESSMENT FOR “SEXUAL CONTACT” WAS ERROR (THIRD DEPT). 8

FORECLOSURE, CIVIL PROCEDURE. 9

ALTHOUGH THE BANK IN THIS FORECLOSURE ACTION INSPECTED THE VACANT PROPERTY AND MADE PERIODIC REPAIRS, IT WAS NOT A “MORTGAGEE IN POSSESSION” SUCH THAT THE STATUTE OF LIMITATIONS WAS TOLLED; IN ORDER TO BE DEEMED A “MORTGAGEE IN POSSESSION,” THE MORTGAGOR MUST CONSENT TO THE BANK’S POSSESSION OF THE PROPERTY (SECOND DEPT). 9

FORECLOSURE, CIVIL PROCEDURE. 9

THE BANK WHICH COMMENCED THE 2006 FORECLOSURE HAD ALREADY ASSIGNED THE NOTE AND MORTGAGE AND DID NOT HAVE STANDING TO FORECLOSE; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START RUNNING IN 2006; THE DISSENT DISAGREED (SECOND DEPT). 9

LABOR LAW-CONSTRUCTION LAW. 10

THE DUCT ON THE FLOOR WAS AN INTEGRAL PART OF THE DEMOLITION WORK, THEREFORE LABOR LAW 241 (6) DID NOT APPLY; THE DEFENDANT DID NOT SUPERVISE OR CONTROL PLAINTIFF’S WORK, THEREFORE LABOR LAW 200 DID NOT APPLY (FIRST DEPT). 10

LANDLORD-TENANT. 10

RECENT CHANGES TO THE STATUTES: (1) REQUIRING A LANDLORD TO MITIGATE DAMAGES WHEN A TENANT ABANDONS A RESIDENTIAL APARTMENT BEFORE THE END OF THE LEASE; AND (2), APPLYING A SECURITY DEPOSIT TO REPAIRS, INTERPRETED AND APPLIED (FIRST DEPT). 10

Table of Contents

RETIREMENT AND SOCIAL SECURITY LAW..... 11

THE WIND BLOWING A DOOR SHUT ON PETITIONER POLICE OFFICER’S HAND DID NOT CONSTITUTE AN
“ACCIDENT” WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT).... 11

WORKERS' COMPENSATION. 11

CLAIMANT’S EXPERT PROVIDED SUFFICIENT EVIDENCE OF A CAUSAL RELATIONSHIP BETWEEN
CLAIMANT FIREFIGHTER’S LUNG CANCER AND EXPOSURE TO TOXINS AT GROUND ZERO, WORKERS’
COMPENSATION BOARD REVERSED (THIRD DEPT). 11

APPEALS, CIVIL PROCEDURE, JUDGES.

IN THIS ARTICLE 78 PROCEEDING, NO APPEAL LIES FROM A JUDGE'S DECLINING TO SIGN AN ORDER TO SHOW CAUSE; THE ONLY REMEDY IS A MOTION TO VACATE THE FINAL JUDGMENT (FIRST DEPT).

[Matter of Alliance to End Chickens as Kaporos v New York City Police Dept., 2022 NY Slip Op 00041, First Dept 1-6-22](#)

Practice Point: Here, in the context of an Article 78 proceeding, the judge's refusal to sign an order to show cause was not directly appealable. A motion to vacate the final judgment may have preserved the issue for appeal (my interpretation of the ruling).

APPEALS, CRIMINAL LAW, EVIDENCE.

CRIMINAL SALE OF A CONTROLLED SUBSTANCE FIRST DEGREE AND THE RELATED CONSPIRACY CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE (THIRD DEPT).

[People v Adams, 2022 NY Slip Op 00076, Third Dept 1-6-22](#)

Practice Point: A "weight-of-the-evidence" review by an appellate court does not require preservation (unlike a "legally-sufficient-evidence" review) and will be successful if conflicting evidence at trial throws doubt on an essential element of an offense.

APPEALS, FORECLOSURE, CIVIL PROCEDURE, JUDGES.

ALTHOUGH THE MOTION TO DISMISS THE FORECLOSURE ACTION AS ABANDONED PURSUANT TO CPLR 3215 WAS DENIED ON A GROUND NOT RAISED BY THE PARTIES, THE ORDER WAS SELF-PRESERVED AND APPEALABLE; THE PRESENTATION OF AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFENDANT’S DEFAULT PRECLUDES A FINDING THAT THE ACTION WAS ABANDONED PURSUANT TO CPLR 3215, DESPITE THE MOTION COURT’S REJECTION OF THE ORDER AS INCOMPLETE (SECOND DEPT).

[Citibank, N.A. v Kerszko, 2022 NY Slip Op 00032, Second Dept 1-5-22](#)

Practice Point: Here the denial of the motion to dismiss the foreclosure action as abandoned was appealable, even though the denial was on a ground not raised by the parties. The order was deemed “self-preserving.”

ATTORNEYS, PRIVILEGE, CIVIL RIGHTS LAW, DEFAMATION.

THE PRIVILEGE AFFORDED ATTORNEYS UNDER THE CIVIL RIGHTS LAW RE: ALLEGEDLY DEFAMATORY CLAIMS INCLUDED IN A COMPLAINT (WITH ONE EXCEPTION NOT APPLICABLE HERE) IS ABSOLUTE, EVEN IN THE FACE OF ALLEGATIONS OF MALICE AND BAD FAITH (FIRST DEPT).

[Weeden v Lukezic, 2022 NY Slip Op 00026, First Dept 1-4-22](#)

Practice Point: With one exception not relevant to this case (a “sham” action), the contents of complaints drafted by attorneys are protected from defamation actions by absolute privilege, even in the face of allegations of malice or bad faith.

CONDOMINIUMS, ASSOCIATIONS.

THE CONDOMINIUM BOARD OF MANAGERS PROPERLY APPLIED THE BUSINESS JUDGMENT RULE WHEN IT AUTHORIZED CONSTRUCTION WHICH NARROWED PLAINTIFF'S BOAT SLIP; THE DISSENT ARGUED THE BOARD FAILED TO SHOW THAT IT ACTED IN ACCORDANCE WITH THE CONDOMINIUM BYLAWS, WHICH IS REQUIRED BY THE BUSINESS JUDGMENT RULE (SECOND DEPT).

[Katz v Board of Mgrs. of Stirling Cove Condominium Assn., 2022 NY Slip Op 00033, Second Dept 1-5-22](#)

Practice Point: Here the condominium board of managers acted within the scope of its authority under the business judgment rule when it narrowed the plaintiff-condominium-owner's boat slip after hurricane damage.

CONTRACT LAW, UNIFORM COMMERCIAL CODE.

DEFENDANT PROPERLY REJECTED THE MACHINES AS NONCONFORMING GOODS, PLAINTIFF DID NOT CURE THE NONCONFORMITY, AND DEFENDANT WAS ENTITLED TO CONSEQUENTIAL DAMAGES AND LOST PROFITS (SECOND DEPT).

[Mil-Spec Indus. Corp. v Expansion Indus., LLC, 2022 NY Slip Op 00035, Second Dept 1-5-22](#)

Practice Point: Here, the sale of nonconforming machines used by the buyer to manufacture goods warranted the award of nearly \$3 million in lost profits.

CONTRACT LAW.

BECAUSE PLAINTIFF ALLEGED THE ORAL CONTRACT WAS ENFORCEABLE EVEN IF THE TRIGGERING EVENT OCCURRED AFTER A YEAR, THE CONTRACT WAS WITHIN THE STATUTE OF FRAUDS AND THEREFORE MUST IN BE WRITING (FIRST DEPT).

[Birnbaum v Goldenberg Consulting Group, Inc., 2022 NY Slip Op 00042, First Dept 1-6-22](#)

Practice Point: An oral contract which may or may not be performed within one year is not enforceable.

CRIMINAL LAW, JURORS.

THE JUROR'S SIMULATION OF THE STABBING IN THE JURY ROOM DID NOT CONSTITUTE JUROR MISCONDUCT (FIRST DEPT).

[People v Hubbard, 2022 NY Slip Op 00017, First Dept 1-4-22](#)

Practice Point: A juror's simulation of the stabbing during deliberations was not "juror misconduct."

CRIMINAL LAW, JUDGES.

THE MAJORITY CONCLUDED THE INTERVENTION BY THE TRIAL JUDGE DID NOT DEPRIVE DEFENDANT OF A FAIR TRIAL; STRONG TWO-JUSTICE DISSSENT (SECOND DEPT).

[People v Martinez, 2022 NY Slip Op 00037, Second Dept 1-5-22](#)

Practice Point: This decision, because of the detailed two-justice dissent, gives some insight into how much intervention by a judge in a criminal trial will be tolerated.

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE UNLAWFUL SURVEILLANCE CONVICTION DID NOT INVOLVE “SEXUAL CONTACT” AS DEFINED BY THE PENAL LAW; THEREFORE THE 20 POINT ASSESSMENT FOR “SEXUAL CONTACT” WAS ERROR (THIRD DEPT).

[People v Wassilie, 2022 NY Slip Op 00103, Third Dept 1-6-22](#)

Practice Point: The crime of which the sex offender was accused, unlawful surveillance, did not involve “sexual contact” as defined by the Penal Law. Therefore the 20 point risk-assessment for “sexual contact” was error.

FORECLOSURE, CIVIL PROCEDURE.

ALTHOUGH THE BANK IN THIS FORECLOSURE ACTION INSPECTED THE VACANT PROPERTY AND MADE PERIODIC REPAIRS, IT WAS NOT A “MORTGAGEE IN POSSESSION” SUCH THAT THE STATUTE OF LIMITATIONS WAS TOLLED; IN ORDER TO BE DEEMED A “MORTGAGEE IN POSSESSION,” THE MORTGAGOR MUST CONSENT TO THE BANK’S POSSESSION OF THE PROPERTY (SECOND DEPT).

[Mardenborough v U.S. Bank N.A., 2022 NY Slip Op 00034, Second Dept 1-5-22](#)

Practice Point: When a bank is deemed a “mortgagee in possession” of the property, the statute of limitations for a foreclosure action is tolled. However, the bank is not a “mortgagee in possession” unless the mortgagor consents to the bank’s possession of the property. Merely inspecting the property and making repairs, absent the mortgagor’s consent, is not enough.

FORECLOSURE, CIVIL PROCEDURE.

THE BANK WHICH COMMENCED THE 2006 FORECLOSURE HAD ALREADY ASSIGNED THE NOTE AND MORTGAGE AND DID NOT HAVE STANDING TO FORECLOSE; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START RUNNING IN 2006; THE DISSENT DISAGREED (SECOND DEPT).

[21st Mtge. Corp. v Rudman, 2022 NY Slip Op 00031, Second Dept 1-5-22](#)

Practice Point: Even the original lender does not have standing to foreclose if the note has been assigned prior to commencing the foreclosure proceedings.

LABOR LAW-CONSTRUCTION LAW.

THE DUCT ON THE FLOOR WAS AN INTEGRAL PART OF THE DEMOLITION WORK, THEREFORE LABOR LAW 241 (6) DID NOT APPLY; THE DEFENDANT DID NOT SUPERVISE OR CONTROL PLAINTIFF'S WORK, THEREFORE LABOR LAW 200 DID NOT APPLY (FIRST DEPT).

[Mateo v Iannelli Constr. Co. Inc., 2022 NY Slip Op 00010, First Dept 1-4-22](#)

Practice Point: Here, during demolition, plaintiff fell attempting to climb over a duct which had been taken down and placed on the floor. Because the duct was an “integral part” of the demolition work, the accident was not actionable under Labor Law 241(6).

LANDLORD-TENANT.

RECENT CHANGES TO THE STATUTES: (1) REQUIRING A LANDLORD TO MITIGATE DAMAGES WHEN A TENANT ABANDONS A RESIDENTIAL APARTMENT BEFORE THE END OF THE LEASE; AND (2), APPLYING A SECURITY DEPOSIT TO REPAIRS, INTERPRETED AND APPLIED (FIRST DEPT).

[14 E. 4th St. Unit 509 LLC v Toporek, 2022 NY Slip Op 00002, First Dept 1-4-22](#)

Practice Point: This opinion explains recent changes to Real Property Law 227-e and General Obligations law 7-108 regarding the landlord's duty to mitigate damages (when a tenant abandons an apartment before the end of the lease), and the landlord's use of a security deposit to make repairs.

RETIREMENT AND SOCIAL SECURITY LAW.

THE WIND BLOWING A DOOR SHUT ON PETITIONER POLICE OFFICER'S HAND DID NOT CONSTITUTE AN "ACCIDENT" WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT).

[Matter of Rizzo v DiNapoli, 2022 NY Slip Op 00095, Third Dept 1-6-22](#)

Practice Point: The term "accident" in the context of the Retirement and Social Security Law has a very specific meaning. It does not encompass, for example, injury to a police officer from a foreseeable event, here the wind blowing a door shut on the officer's hand.

WORKERS' COMPENSATION.

CLAIMANT'S EXPERT PROVIDED SUFFICIENT EVIDENCE OF A CAUSAL RELATIONSHIP BETWEEN CLAIMANT FIREFIGHTER'S LUNG CANCER AND EXPOSURE TO TOXINS AT GROUND ZERO, WORKERS' COMPENSATION BOARD REVERSED (THIRD DEPT).

[Matter of Murphy v New York State Cts., 2022 NY Slip Op 00087, Third Dept 1-6-22](#)

Practice Point: In this World-Trade-Center workers' compensation case, the failure to present studies to support the claimant's expert's testimony that claimant's cancer was caused by toxins at Ground Zero did not warrant rejection of the expert's opinion. The issue could have been raised at the hearing, but wasn't.

Copyright 2022 New York Appellate Digest, LLC