NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Newsletter
March 2022

An Organized Compilation of the Most Significant Summaries of Selected Decisions Addressing Civil Procedure, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in March 2022, Distilled to Practice Points, One or Two Sentences Each. The Entries in the Table of Contents Link to the Practice Points Which Link to the Full 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 Reversal Report.

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ADMINISTRATIVE LAW, ATTORNEYS FEES, EQUAL ACCESS TO JUSTICE ACT.

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Matter of Vapor Tech. Assn. v Cuomo, 2022 NY Slip Op 02171, Third Dept 3-31-22

Practice Point: Even though a party which prevails against a state agency is generally entitled to attorney's fees pursuant to the State Equal Access to Justice Act, if the agency's actions are deemed "substantially justified" attorney's fees will not be awarded. Here the Department of Health's adoption of emergency regulations banning the sale of flavored vaping liquids (targeting young people as a market) was deemed "substantially justified" by the appellate court. The award of attorney's fees by Supreme Court was reversed.

AMEND COMPLAINT, CIVIL CONSPIRACY.

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT SHOULD NOT HAVE BEEN GRANTED; THE ADDED DEFENDANT DID NOT HAVE ANY INTEREST IN THE PROPERTY IN DISPUTE; AND THE CIVIL CONSPIRACY CAUSE OF ACTION PLAINTIFF SOUGHT TO ADD IS NOT RECOGNIZED IN NEW YORK; THEREFORE THE PROPOSED AMENDMENTS WERE PATENTLY DEVOID OF MERIT (FOURTH DEPT).

Landco H & L, Inc. v 377 Main Realty, Inc., 2022 NY Slip Op 01695, Fourth Dept 3-11-22

Practice Point: New York does not recognize civil conspiracy as a tort. This case is an example of what it means to find proposed amendments to a complaint "patently devoid of merit."

APPEALS, FUGITIVE DISENTITLEMENT DOCTRINE.

ALTHOUGH THE APPELLANT WAS IN JAPAN, THE 1ST DEPARTMENT REFUSED TO DISMISS THE APPEAL PURSUANT TO THE FUGITIVE DISENTITLEMENT DOCTRINE IN THIS FAMILY COURT CIVIL-CONTEMPT MATTER; APPELLANT HAD APPEARED VIRTUALLY IN COURT PROCEEDINGS AND STATED HE WOULD RETURN TO NEW YORK TO COMPLY WITH ANY COURT ORDER (FIRST DEPT).

Matter of Hilary C. v Michael K., 2022 NY Slip Op 01512, First Dept 3-10-22

Practice Point: If an appellant leaves the court's jurisdiction (here father went to Japan), the appeal may be dismissed pursuant to the fugitive disentitlement doctrine. The doctrine was not applied in this Family Court civil contempt case because father participated in court proceedings virtually and stated he would return to New York to comply with any court order.

CHILD VICTIM'S ACT, FIDUCIARY DUTY.

IN THIS CHILD VICTIM'S ACT PROCEEDING PLAINTIFF ALLEGED ABUSE BY A PRIEST AND TEACHER IN ELEMENTARY SCHOOL; PLAINTIFF ALLEGED THE SCHOOL WAS OVERSEEN BY DEFENDANTS PARISH AND DIOCESE; THE 2ND DEPARTMENT HELD THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE THERE WAS NOTHING UNIQUE ABOUT THE RELATIONSHIP BETWEEN DEFENDANTS AND PLAINTIFF, AS OPPOSED TO THE RELATIONSHIPS WITH THE OTHER PARISHIONERS (SECOND DEPT).

J. D. v Roman Catholic Diocese of Brooklyn, 2022 NY Slip Op 01766, Second Dept 3-16-22

Practice Point: Here the breach of a fiduciary duty cause of action against the parish and diocese which oversaw the elementary school where plaintiff allegedly was sexually abused was dismissed. There was nothing unique about the relationship between the defendants and plaintiff which set it apart from the relationships with the other parishioners.

CIVIL RIGHTS LAW, RETROACTIVE APPLICATION OF STATUTE.

THE 2020 AMENDMENTS TO CIVIL RIGHTS LAW 70, THE ANTI-SLAPP LAW, DO NOT APPLY RETROACTIVELY TO THE PLAINTIFF'S PENDING DEFAMATION ACTION AGAINST DEFENDANT (FIRST DEPT).

Gottwald v Sebert, 2022 NY Slip Op 01515, First Dept 3-10-22

Practice Point: The fact that a statute is deemed "remedial" in nature does not necessarily support a retroactive application of the statute. Here the 2020 amendments to the anti-SLAPP law, although "remedial," were not applied retroactively to cover plaintiff's pending defamation action against the defendant.

The defendant's motion for a ruling applying the amendments retroactively should not have been granted.

CORPORATION LAW, PROPER FORUM, FOREIGN LAW.

ALTHOUGH THIS SHAREHOLDERS' DERIVATIVE ACTION AGAINST A SWISS CORPORATION REQUIRES THE APPLICATION OF SWISS LAW, NEW YORK IS THE PROPER FORUM; MOST ON THE BOARD OF DIRECTORS ARE RESIDENTS OF NEW YORK AND THE ALLEGATIONS IN THE COMPLAINT REFLECT A SUBSTANTIAL NEXUS TO NEW YORK (FIRST DEPT).

Wormwood Capital LLC v Mulleady, 2022 NY Slip Op 01526, First Dept 3-10-22

Practice Point: Although this shareholders' derivative action is against a Swiss corporation and requires the application of Swiss law, New York is the proper forum. Most of the directors live in New York, most of the witnesses are in the US and New York, most of the evidence is located in New York, and allegations in the complaint demonstrate a substantial nexus to New York. Defendants did not show they will suffer any prejudice if the suit is heard here.

DEBTOR-CREDITOR, ENFORCEMENT OF JUDGMENT AGAINST NON-DEBTORS.

IN AN ACTION SEEKING TO ENFORCE A JUDGMENT AGAINST NON-DEBTORS PURSUANT TO CPLR ARTICLE 52, THE PETITIONERS ARE NOT ENTITLED TO A JURY TRIAL; THE ACTION IS EQUITABLE IN NATURE, DESPITE THE DEMAND FOR MONETARY DAMAGES (FIRST DEPT).

Matter of Uni-Rty Corp. v New York Guangdong Fin., 2022 NY Slip Op 01525, First Dept 3-10-22

Practice Point: An action pursuant to CPLR Article 52 to enforce a judgment against non-debtors is equitable in nature. A jury trial is therefore not available. The demand for money damages (legal relief) did not alter the fact that petitioners are primarily seeking equitable relief.

DEBTOR-CREDITOR, ENFORCEMENT OF JUDGMENT ENTERED IN PEOPLE'S REPUBLIC OF CHINA.

SUPREME COURT SHOULD NOT HAVE DISMISSED AN ACTION TO ENFORCE A MONEY JUDGMENT OBTAINED IN THE PEOPLE'S REPUBLIC OF CHINA (PRC) ON THE IMPLICIT GROUND THE DEFENDANTS WERE NOT AFFORDED DUE PROCESS IN THE PRC; THE US STATE DEPARTMENT DOCUMENTS UPON WHICH SUPREME COURT'S RULING WAS BASED DO NOT CONSTITUTE DOCUMENTARY EVIDENCE; THE COMPLAINT SUFFICIENTLY ALLEGED DEFENDANTS HAD AN OPPORTUNITY TO BE HEARD, WERE REPRESENTED BY COUNSEL AND HAD THE OPPORTUNITY TO APPEAL IN THE PRC ACTION (FIRST DEPT).

Shanghai Yongrun Inv. Mgt. Co., Ltd v Maodong Xu, 2022 NY Slip Op 01523, First Dept 3-10-22

Practice Point: The complaint adequately alleged the money judgment obtained by plaintiff in the People's Republic of China (PRC) was procured in accordance with due process requirements. The defendant had the opportunity to be heard, was represented by counsel and had the right to an appeal. State department documents alleging a lack of judicial independence in the PRC did not constitute "documentary evidence" which would support a motion to dismiss.

DEBTOR-CREDITOR, FRAUD, INJUNCTION.

IF PLAINTIFFS IN A FRAUDULET-CONVEYANCE AND ENFORCEMENT-OF-MONEY JUDGMENT PROCEEDING CAN BE FULLY COMPENSATED BY MONEY DAMAGES, IT IS ERROR TO ISSUE A PRELIMINARY INJUNCTION (FIRST DEPT),

Medallion Fin. Corp. v Tsitiridis, 2022 NY Slip Op 02090, First Dept 3-29-22

Practice Point: If a plaintiff can be fully compensated by money damages, an injunction is not an available remedy.

DEFAULT, CORPORATION LAW, LIMITED LIABILITY COMPANY LAW.

DEFENDANTS DID NOT DEMONSTRATE ACTUAL NOTICE OF THE SUMMONS WAS NOT RECEIVED IN TIME TO DEFEND THE ACTION, AND DID NOT PROVIDE A REASONABLE EXCUSE FOR THE DEFAULT; DEFENDANTS' MOTION TO VACATE THE DEFAULT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Andrews v Wartburg Receiver, LLC, 2022 NY Slip Op 01980, Second Dept 2-23-22

Practice Point: A denial of the receipt of the summons and complaint, without more, does not demonstrate actual notice of the summons was not received in time to defend, and does not demonstrate a reasonable excuse for a defaulting.\

DISCLOSURE OF TAX RETURNS.

PLAINTIFF COUNTY, ACTING ON BEHALF OF THE NURSING HOME WHERE DECEDENT WAS CARED FOR, WAS ENTITLED TO DISCLOSURE OF DECEDENT'S TAX RETURNS; THE RETURNS ARE RELEVANT TO WHETHER DECEDENT'S SON BREACHED THE "RESPONSIBLE PARTY AGREEMENT" WHICH REQUIRED HIM TO USE THE DECEDENT'S INCOME TO PAY THE NURSING HOME (THIRD DEPT).

County of Warren v Swan, 2022 NY Slip Op 02169, Third Dept 3-31-22

Practice Point: Although tax returns are generally not discoverable until a judgment is obtained, here the decedent's returns were deemed relevant to whether decedent's son breached the "responsible party agreement" with the nursing home which cared for decedent. The agreement required decedent's son to pay the nursing home from decedent's income and resources.

DISMISSAL OF COMPLAINT, JUDGES, NO VALID 90-DAY NOTICE.

EVEN THOUGH PLAINTIFF DID NOT TIMELY FILE A NOTE OF ISSUE AND DID NOT COMPLY WITH A PRIOR DISCOVERY ORDER, THE JUDGE WAS WITHOUT AUTHORITY TO, SUA SPONTE, DISMISS THE COMPLAINT BECAUSE PLAINTIFF HAD NOT BEEN SERVED WITH A VAILD 90-DAY DEMAND TO FILE A NOTE OF ISSUE (SECOND DEPT).

Moreau v Cayton,, 2022 NY Slip Op 01450, Second Dept 3-9-22

Practice Point: The judge did not have the authority to, sua sponte, dismiss the complaint, even though plaintiff had not timely filed a note of issue and had not complied with a prior discovery order, because the plaintiff had not been served with a valid 90-day demand to file a note of issue.

FAMILY LAW, APPEALS, DEFAULT, ATTORNEYS.

THE MAJORITY HELD THE APPELLATE DIVISION PROPERLY REFUSED TO HEAR APPELLANT FATHER'S APPEAL IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING BECAUSE FATHER WAS IN DEFAULT (NO APPEAL LIES FROM A DEFAULT); THE DISSENT ARGUED FATHER WAS NOT IN DEFAULT BECAUSE HE APPEARED BY COUNSEL (CT APP).

Matter of Irelynn S., 2022 NY Slip Op 01869, Ct App 3-17-22

Practice Point: No appeal lies from a default judgment. The dissent argued: A party who appears by counsel, as appellant father did in these termination-of-parental-rights proceedings, is not in default.

FAMILY LAW, JURISDICTION.

FAMILY COURT DID NOT HAVE JURISDICTION TO MODIFY A SEPARATION AGREEMENT WHICH WAS INCORPORATED BUT NOT MERGED INTO THE JUDGMENT OF DIVORCE; A PLENARY ACTION IS REQUIRED (FIRST DEPT).

Matter of Deborah K. v Richard K., 2022 NY Slip Op 01391, First Dept 3-3-22

Practice Point: Family Court did not have jurisdiction to amend a stipulation of settlement which was incorporated but not merged into the divorce judgment. A plenary action was necessary.

FAMILY LAW, VENUE FOR DIVORCE, SEASONAL HOME, COVID.

THE COUNTY WHERE PLAINTIFF AND DEFENDANT OWNED A SEASONAL SECOND HOME (WHERE DEFENDANT LIVED AFTER COVID REACHED NEW YORK CITY) WAS NOT THE PROPER VENUE FOR THE DIVORCE ACTION (SECOND DEPT).

Fisch v Davidson, 2022 NY Slip Op 01442, Second Dept 3-9-22

Practice Point: In this divorce action commenced in August 2020 (during the pandemic), the county were plaintiff and defendant owned a seasonal home, and where defendant moved when COVID reached New York City, was not the proper venue. New York County, where the couple primarily resided, was deemed the proper venue for the divorce proceedings.

FAMILY LAW, JUDGES, ADOPTION OF PARTY'S FINDINGS OF FACT.

THE WIFE'S REQUEST FOR MAINTENANCE WAS REJECTED WITHOUT EXPLANATION AND THE HUSBAND'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE WHOLLY ADOPTED BY SUPREME COURT; THE THIRD DEPARTMENT AWARDED MAINTENANCE ON APPEAL (THIRD DEPT).

Louie v Louie, 2022 NY Slip Op 02172, Third Dept 3-31-22

Practice Point: Here in this divorce proceeding the judge did not give any indication of the rationale for rejecting the wife's request for maintenance and wholly adopted the husband's findings of fact and conclusions of law. Findings of fact cannot constitute a court's decision. Rather than remitting the matter, the Third Department awarded maintenance.

FAMILY LAW, JUDGES, ATTORNEYS, COURT-ACCESS BY NEWS OUTLET.

A LOCAL ONLINE NEWS OUTLET SHOULD NOT HAVE BEEN EXCLUDED FROM A FAMILY COURT HEARING REGARDING WHETHER A DEPUTY COUNTY ATTORNEY SHOULD BE DISQUALIFIED FROM A NEGLECT PROCEEDING ON CONFLICT OF INTEREST GROUNDS; THE OUTLET IS ENTITLED TO A TRANSCRIPT OF THE HEARING (FOURTH DEPT).

Matter of Rajea T. (Niasia J.), 2022 NY Slip Op 01940, Fourth Dept 3-18-22

Practice Point: Although the general public can be excluded from Family Court Article 10 proceedings, the judge exercising the discretion to exclude an observer must make certain findings in accordance with 22 NYCRR 205-4 (b). Family Court here made no findings and abused its discretion by excluding the news outlet. The court proceeding concerned whether the county attorney handling the neglect case should be disqualified on conflict of interest grounds, and did not concern the underlying allegations of neglect. The new outlet is entitled to a transcript of the hearing.

FAMILY LAW, JUDGES, DEFAULT WARNING.

IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, ALTHOUGH FAMILY COURT THREATENED TO FIND RESPONDENT IN DEFAULT WHEN HE DID NOT PROVIDE PROOF HE FAILED TO APPEAR BECAUSE HE WAS HOSPITALIZED, FAMILY COURT DID NOT ULTIMATELY GIVE RESPONDENT A "DEFAULT WARNING;" RESPONDENT AND HIS COUNSEL WERE PRESENT AT THE FACT-FINDING BUT WERE PRECLUDED BY THE COURT FROM PARTICIPATING; RESPONDENT HAS A RIGHT TO BE HEARD ON THE ABANDONMENT ISSUE; REVERSED AND REMITTED (THIRD DEPT).

Matter of Makayla NN. (Charles NN.), 2022 NY Slip Op 02165, Third Dept 3-31-22

Practice Point: Here Family Court never gave a "default warning" to respondent father when he failed to provide proof he did not appear because he was hospitalized. Father, who was present at the fact-finding, should not have been found to be in default and precluded from participating in the termination of parental rights proceeding.

FAMILY LAW, JUDGES, ORDER VS DECISION.

WHERE AN ORDER CONFLICTS WITH A DECISION, THE DECISION CONTROLS (FOURTH DEPT).

Reukauf v Kraft, 2022 NY Slip Op 01898, Fourth Dept 3-18-22

Practice Point: If there is a conflict between an order and a decision, the decision controls.

FAMILY LAW, MENTAL HYGIENE LAW, IMPROPER DEFAULT.

SUPREME COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT OF DIVORCE AGAINST THE HUSBAND, WHO WAS REPRESENTING HIMSELF, WHEN HE DID NOT APPEAR AT THE INQUEST; BOTH THE COURT AND THE WIFE WERE AWARE THE HUSBAND HAD BEEN DIAGNOSED WITH A SIGNIFICANT MENTAL HEALTH CONDITION (FIRST DEPT).

Richard v Buck, 2022 NY Slip Op 02101, First Dept 3-29-22

Practice Point: Here both the court and the wife were aware the husband, who was representing himself and did not appear at the inquest, suffered from a significant mental health condition. The default judgment of divorce should not have been entered. The judgment was vacated. If necessary, Supreme Court should hold a hearing to determine the husband's capacity.

FIDUCIARY DUTY, BREACH OF, CONVERSION, FRAUD, STATUTE OF LIMITATIONS.

CAUSES OF ACTION ALLEGING BREACH OF FIDUCIARY DUTY DO NOT ACCRUE UNTIL THE FIDUCIARY DUTY IS OPENLY REPUDIATED; CAUSES OF ACTION FOR CONVERSION BASED UPON FRAUD ARE TIMELY SIX YEARS FROM THE CONVERSION OR TWO YEARS FROM DISCOVERY OF THE CONVERSION; THE RELEVANT CAUSES OF ACTION HERE, THEREFORE, SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

Star Auto Sales of Queens, LLC v Filardo, 2022 NY Slip Op 01476, Second Dept 3-9-22

Practice Point: The statute of limitations for breach of fiduciary duty does not start running until the fiduciary openly repudiates the duty.

Practice Point: The statute of limitations for conversion based upon fraud is six years from the conversion or two years from discovery of the conversion.

FORECLOSURE, ATTORNEY'S FAILURE TO APPEAR, POSSESSION OF THE NOTE, STANDING.

DEFENDANT NEVER PHYSICALLY POSSESSED THE NOTE UNDERLYING THE MORTGAGE AND WAS NEVER ASSIGNED THE NOTE; THEREFORE DEFENDANT DOES NOT HAVE STANDING TO FORECLOSE ON THE MORTGAGE; AN ATTORNEY'S FAILURE TO APPEAR AT A FULLY BRIEFED MOTION ARGUMENT IS NOT A DEFAULT (FOURTH DEPT).

Hummel v Cilici, LLC, 2022 NY Slip Op 01690, Fourth Dept 3-11-22

Practice Point: An attorney's failure to appear at a fully briefed motion argument is not a default.

Practice Point: A party who never physically possessed the note underlying the mortgage does not have standing to foreclose.

FORECLOSURE, JURISDICTION, "LIMITED" ATTORNEY-APPEARANCE.

ALTHOUGH DEFENDANTS WERE NOT PROPERLY SERVED IN THIS FORECLOSURE ACTION AND THEIR MOTION TO VACATE THE JUDGMENT WAS GRANTED ON THAT GROUND, THE DEFENDANTS' ATTORNEY'S "LIMITED APPEARANCE" AT A SETTLEMENT CONFERENCE PROVIDED THE COURT WITH JURISDICTION OVER THE MATTER; THE MOTION TO VACATE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

US Bank N.A. v Chkifati, 2022 NY Slip Op 02151, Second Dept 3-30-22

Practice Point: Here defendants proved they were not properly served with the summons and complaint in this foreclosure action and Supreme Court granted their motion to vacate the judgment. However the appellate court reversed because the defendants' attorney's "limited appearance" for the settlement conferenced provided the court with jurisdiction (just as if defendants had been properly served).

FORECLOSURE, NEGLECT TO PROSECUTE.

THE CONDITIONAL ORDER OF DISMISSAL DID NOT MEET THE REQUIREMENTS OF CPLR 3216 BECAUSE ISSUE WAS NEVER JOINED IN THIS FORECLOSURE ACTION; THE ACTION SHOULD NOT HAVE BEEN DISMISSED FOR FAILURE TO PROSECUTE (SECOND DEPT).

Central Mtge. Co. v Ango, 2022 NY Slip Op 01286, Second Dept 3-2-22

Practice Point: If issue was never joined, a dismissal for failure to prosecute (CPLR 3216) is not available.

FORECLOSURE, SETTLEMENT CONFERENCE, ABANDONMENT.

DEFENDANTS' PARTICIPATION IN A SETTLEMENT CONFERENCE DID NOT WAIVE THEIR RIGHT TO MOVE TO DISMISS THE FORECLOSURE ACTION AS ABANDONED PURSUANT TO CPLR 3215 (SECOND DEPT).

PennyMac Corp. v Weinberg, 2022 NY Slip Op 02010, Second Dept 3-23-22

Practice Point: Participation in a settlement conference does not waive a defendant's right to move to dismiss a foreclosure action as abandoned based on plaintiff bank's failure to move for a default judgment within a year.

FORECLOSURE, STANDING, STATUTE OF LIMITATIONS.

IF THE 2008 FORECLOSURE ACTION COMMENCED BY AEGIS WAS VALID, THE INSTANT FORECLOSURE ACTION BY A DIFFERENT BANK WOULD BE TIME-BARRED; PLAINTIFF BANK RAISED A QUESTION OF FACT BY SUBMITTING EVIDENCE THAT AEGIS DID NOT POSSESS THE NOTE AND MORTGAGE AT THE TIME THE 2008 ACTION WAS COMMENCED AND THEREFORE DID NOT HAVE STANDING TO FORECLOSE (SECOND DEPT).

U.S. Bank N..A. v Nail, 2022 NY Slip Op 02034, Second Dept 3-23-22

Practice Point: If a bank did not possess the note and mortgage at the time it commenced a foreclosure action, the action is a nullity.

FORECLOSURE, STANDING.

THE LOST NOTE AFFIDAVIT SUBMITTED BY THE BANK WAS INSUFFICIENT; THEREFORE THE BANK DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION; DEFENDANTS' MOTION TO AMEND THE ANSWER TO ASSERT THE LACK OF STANDING DEFENSE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Deutsche Bank Natl. Trust Co. v Kreitzer. 2022 NY Slip Op 01441, Second Dept 3-9-22

Practice Point: The bank was unable to demonstrate standing to bring the foreclosure action because the lost note affidavit was insufficient. Even a late motion to amend an answer should be granted if there is no prejudice to the plaintiff. Here the motion to add the lack of standing defense to the answer should have been granted.

FORECLOSURE, STANDING, UNIFORM COMMERCIAL CODE.

THE BANK FAILED TO DEMONSTRATE STANDING TO BRING THE . FORECLOSURE ACTION; THERE WERE QUESTIONS OF FACT WHETHER THE "HOLDER (OF THE NOTE)" REQUIREMENTS OF THE UCC WERE MET (SECOND DEPT).

HSBC Bank USA, N.A. v Herod, 2022 NY Slip Op 01444, Second Dept 3-9-22

Practice Point: To establish standing, a bank has to prove it was the "holder" of the promissory note within the meaning of the UCC at the time the foreclosure action was commenced. Here there were questions of fact whether the note in the bank's possession was endorsed in blank by an attached "allonge" as required by the UCC.

JUDGES, REMARKS PREJUDICED THE JURY.

REMARKS BY THE JUDGE AND DEFENDANT'S COUNSEL PREJUDICED THE JURY IN THIS MEDICAL MALPRACTICE CASE; ALTHOUGH NOT PRESERVED, THE ISSUE WAS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE; DEFENSE VERDICT SET ASIDE (SECOND DEPT).

Valenti v Gadomski, 2022 NY Slip Op 01342, Second Dept 3-2-22

Practice Point: Prejudicial comments by the judge and defense counsel required a new trial in this med mal case.

JURISDICTION, LANDLORD-TENANT, CIVIL PROCEDURE, MUNICIPAL LAW, TENANT HARASSMENT.

THE TENANT HARASSMENT CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED; SUPREME COURT HAD SUBJECT MATTER JURISDICTION FOR THAT CAUSE OF ACTION (SECOND DEPT).

Akter v Zara Realty Holding Corp., 2022 NY Slip Op 01434, Second Dept 3-9-22

Practice Point: Supreme Court has subject matter jurisdiction over a tenant harassment cause of action pursuant to the the NYC Administrative Code.

LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION, COLLATERAL ESTOPPEL.

THE WORKERS' COMPENSATION BOARD RULED THE PLAINTIFF DID NOT HAVE "POST-CONCUSSION SYNDROME" OR A "CONCUSSION CONDITION;" PLAINTIFF WAS THEREFORE ESTOPPED FROM CLAIMING THOSE INJURIES IN THIS LABOR LAW ACTION (FOURTH DEPT).

Szymkowiak v New York Power Auth., 2022 NY Slip Op 01702, Fourth Dept 3-11-22

Practice Point: Here the Workers' Compensation Board's ruling plaintiff did not have "post-concussion syndrome" or a "concussion condition" precluded claims for those injuries in the plaintiff's Labor Law action pursuant to the doctrine of collateral estoppel.

MOTION TO RENEW.

PLAINTIFFS' MOTION TO RENEW ON THE GROUND THE DEFENDANTS' WINNING ARGUMENT WAS RAISED FOR THE FIRST TIME IN REPLY PAPERS SHOULD HAVE BEEN GRANTED (FIRST DEPT).

Mehra v Morrison Cohen LLP, 2022 NY Slip Op 01396, First Sept 3-3-22

Practice Point: Here the fact that the winning argument was first raised in reply papers was a proper ground for a motion to renew.

PRIVILEGE, PHYSICIAN-PATIENT, BREACH IS A TORT.

PLAINTIFF STATED A CAUSE OF ACTION FOR BREACH OF THE PHYSICIAN-PATIENT PRIVILEGE, A TORT (THIRD DEPT).

Bonner v Lynott, 2022 NY Slip Op 02175, Third Dept 3-31-22

Practice Point: Here plaintiff stated a cause of action for breach of the patient-physician privilege which sounds in tort and includes damages as an element.

SANCTIONS, ATTORNEYS, JUDGES.

THE JUDGE DID NOT FOLLOW PROPER PROCEDURE FOR IMPOSING SANCTIONS, I.E., PLAINTIFF'S COUNSEL WAS ORDERED TO PAY $10,000 IN COUNSEL FEES TO DEFENDANT'S COUNSEL (FIRST DEPT).

DeSouza v Manhattan RX LLC, 2022 NY Slip Op 01875, First Dept 3-17-22

Practice Point: Before a judge can impose sanctions, here ordering plaintiff's attorney to pay counsel fees in the amount of $10,000 to defendant's attorney, the relevant rules in 22 NYCRR 130-1 must be complied with, i.e., affording an opportunity to be heard and issuing a written decision explaining the conduct, why it was found frivolous and the reasons for the amount awarded or imposed.

STATUTE OF LIMITATIONS DEFENSE ASSERTED IN COUNTERCLAIM.

ALTHOUGH THE MOTION TO DISMISS ON STATUTE OF LIMITATIONS GROUNDS WAS NOT TIMELY, THE ASSERTION OF THE DEFENSE IN THE REPLY TO THE COUNTERCLAIM WAS TIMELY; THE DEFENSE CAN BE RAISED IN A SUBSEQUENT SUMMARY JUDGMENT MOTION (FIRST DEPT).

Han v New York City Tr. Auth., 2022 NY Slip Op 01737, First Dept 3-15-22

Practice Point: Even if it is too late to move to dismiss on statute-of-limitations grounds, if the defense has been timely asserted, it can be the basis of a subsequent summary judgment motion.

TRUSTS AND ESTATES, TURNOVER OF ANNUITY FUNDS ALREADY DISTRIBUTED, STATUTE OF LIMITATIONS.

THE PETITION BROUGHT BY THE EXECUTOR PURSUANT TO SCPA 2103 SOUGHT DISCOVERY AND THE TURNOVER OF ANNUITY FUNDS WHICH HAD BEEN TRANSFERRED TO APPELLANT; THE SCPA 21O3 ACTION IS LIKE AN ACTION FOR CONVERSION OR REPLEVIN AND HAS A THREE-YEAR STATUTE OF LIMITATIONS; HERE THE MOTIONS TO AMEND THE ANSWERS TO ASSERT THE STATUTE OF LIMITATIONS DEFENSE AND FOR SUMMARY JUDGMENT ON THAT GROUND SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Matter of Chustckie, 2022 NY Slip Op 01452, Second Dept 3-9-22

Practice Point: An action by an executor of an estate pursuant to SCPA 2103 seeking the turnover of funds already distributed is in the nature of a conversion or replevin action and has a three-year statute of limitations.

TRUSTS AND ESTATES, SURROGATE'S VS SUPREME COURT.

PETITIONER STARTED PROCEEDINGS CONCERNING THE EXECUTOR'S HANDLING OF DECEDENT'S ASSETS IN SURROGATE'S COURT; AFTER RELIEF WAS DENIED WITHOUT PREJUDICE PETITIONER STARTED SIMILAR PROCEEDINGS IN SUPREME COURT, A COURT OF CONCURRENT JURISDICTION; THE EXECUTOR'S MOTION TO TRANSFER THAT PROCEEDING TO SURROGATE'S COURT SHOULD HAVE BEEN GRANTED (THIRD DEPT).

Matter of McNeil v McNeil, 2022 NY Slip Op 02173, Third Dept 3-31-22

Practice Point: Surrogate's Court and Supreme Court have concurrent jurisdiction. Here a matter concerning the executor's handling of decedent's assets was commenced in Surrogate's Court, and after relief was denied there, a second similar matter was commenced in Supreme Court. The executor's motion to transfer the second proceeding to Surrogate's Court should have been granted.

VENUE, DOCUMENTARY EVIDENCE.

A COMPUTER PRINTOUT FROM THE NYS DEPARTMENT OF STATE WEBSITE PURPORTING TO SHOW THE LOCATION OF DEFENDANT'S PRINCIPAL PLACE OF BUSINESS FOR VENUE PURPOSES WAS NOT ADMISSIBLE AS A BUSINESS RECORD (SECOND DEPT).

Faulkner v Best Trails & Travel Corp., 2022 NY Slip Op 01770, Second Dept 3-16-22

Practice Point: Here a printout from the NYS Department of State purporting to show the location of defendant's principal place of business was not admissible in this dispute over proper venue. The printout was not certified or authenticated and was not supported by a factual foundation sufficient for admissibility as a business record.