NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Newsletter
May 2 – 6, 2022

An Organized Compilation Summaries of Selected of Reversals, Opinions and Decisions with Dissents Released by Our New York State Appellate Courts May 2 – 6, 2022, and Posted on the New York Appellate Digest Website on May, 9, 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 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.

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APPEALS, CRIMINAL LAW, SEX OFFENDER STATUS IS NOT PART OF A SENTENCE.

SEX OFFENDER CERTIFICATION IS NOT PART OF A SENTENCE AND THEREFORE IS NOT COVERED BY THE UNLAWFUL-SENTENCE EXCEPTION TO THE PRESERVATION REQUIREMENT; THEREFORE THE UNPRESERVED ISSUE COULD NOT BE CONSIDERED BY THE COURT OF APPEALS; HOWEVER, UPON REMITTAL, THE ISSUE CAN BE (AND WAS) CONSIDERED AT THE APPELLATE DIVISION LEVEL IN THE INTEREST OF JUSTICE (SECOND DEPT).

People v Buyund, 2022 NY Slip Op 03004, Second Dept 5-4-22

Practice Point: The Court of Appeals does not have interest-of-justice jurisdiction and therefore cannot consider appellate issues that are not preserved. The Appellate Division, however, can invoke interest-of-justice jurisdiction to consider unpreserved appellate issues.

CIVIL PROCEDURE, CHILD VICTIMS ACT, NON-RESIDENT PLAINTIFF.

PLAINTIFF, A FLORIDA RESIDENT, ALLEGEDLY WAS ABUSED BY A PRIEST IN FLORIDA IN 1983 AND 1984; PLAINTIFF SUED THE DIOCESE OF BROOKLYN BECAUSE THE PRIEST WHO ALLEGEDLY ABUSED HIM WAS TRANSFERRED FROM BROOKLYN TO FLORIDA, ALLEGEDLY BECAUSE OF SEXUAL MISCONDUCT WITH CHILDREN; THE CHILD VICTIMS ACT DOES NOT APPLY TO THE NONRESIDENT PLAINTIFF AND THE BORROWING STATUTE DOES APPLY; THEREFORE FLORIDA'S FOUR-YEAR STATUTE OF LIMITATIONS RENDERED PLAINTIFF'S ACTION TIME-BARRED (SECOND DEPT).

S.H. v Diocese of Brooklyn, 2022 NY Slip Op 02982, Second Dept 5-4-22

Practice Point: The Child Victims Act, which extends the statute of limitations for plaintiffs who were abused as children, does not apply to this Florida plaintiff who was allegedly abused in Florida. Plaintiff sued the Diocese of Brooklyn under the theory that the priest who abused him in Florida in 1983 and 1984 was transferred to Florida from Brooklyn, allegedly because of sexual misconduct with children. New York's borrowing statute applied rendering the action time-barred under Florida's four-year statute of limitations.

CIVIL PROCEDURE, AMENDMENT OF BILL OF PARTICULARS.

PLAINTIFFS WERE ENTITLED TO AMEND THE BILL OF PARTICULARS TO THE EXTENT THE AMENDMENT AMPLIFIED THE ALLEGATIONS ALREADY MADE WITHOUT OBJECTION IN THE SUPPLEMENTAL BILL OF PARTICULARS (SECOND DEPT).

B. E. M. v Warwick Val. Cent. Sch. Dist., 2022 NY Slip Op 02990, Second Dept 5-4-22

Practice Point: Here plaintiffs were entitled to amend the supplemental bill of particulars to the extent the amendment amplified allegations already made without objection in the supplemental bill of particulars.

CIVIL PROCEDURE, RELATION-BACK DOCTRINE, STATUTE OF LIMITATIONS.

THE RELATION-BACK DOCTRINE DID NOT APPLY TO SAVE THE AMENDED PETITION CHALLENGING A USE VARIANCE; THE INTITIAL PETITION FAILED TO NAME A NECESSARY PARTY WHO WAS KNOWN TO THE PETITIONERS AND WAS DISMISSED ON THAT GROUND; THE AMENDED PEITITION, WHICH NAMED THE NECESSARY PARTY, WAS DISMISSED AS TIME-BARRED; BECAUSE THE PETITIONERS HAD NO DOUBT ABOUT WHO THE NECESSARY PARTY WAS AND HAD NAMED HER IN A PRIOR PETITION, THE RELATION-BACK DOCTRINE COULD NOT BE INVOKED (SECOND DEPT).

Matter of Nemeth v K-Tooling, 2022 NY Slip Op 03034, Second Dept 5-4-22

Practice Point: Here a necessary party was not named in the petition and the petition was dismissed for that reason. The amended petition, which named the necessary party, was time-barred. The relation-back doctrine could not be invoked

to save the amended petition because the identity of the necessary party was known to the petitioners who had named her in a related petition in 2013.

CIVIL PROCEDURE, UNTIMELY ANSWER AS NOTICE OF APPEARANCE.

DEFENDANT'S UNTIMELY ANSWER WAS REJECTED BY PLAINTIFF BUT PLAINTIFF DEEMED THE ANSWER TO BE A NOTICE OF APPEARANCE; DEFENDANT DID NOT OBJECT; AN APPEARANCE IS THE EQUIVALENT OF SERVICE OF A SUMMONS; THEREFORE DEFENDANT WAIVED THE LACK-OF-PERSONAL-JURISDICTION DEFENSE (SECOND DEPT).

Deutsche Bank Natl. Trust Co. v Muzac, 2022 NY Slip Op 02978, Second Dept 5-4-22

Practice Point: Here defendant's late answer was rejected but plaintiff informed defendant it considered the answer to be a notice of appearance. Defendant did not object. An appearance is equivalent to service of a summons. Therefore defendant waived the lack-of-personal-jurisdiction defense.

CONTRACT LAW, RELEASES, DURESS.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER HE WAS INDUCED TO SIGN RELEASES BY FRAUD, DURESS AND/OR MUTUAL MISTAKE; PLAINTIFF WAS APPROACHED BY HIS EMPLOYER'S LAWYER AND ALLEGEDLY BELIEVED HE WOULD LOSE HIS JOB IF HE DIDN'T SIGN (FIRST DEPT).

Dolcimascolo v 701 7th Prop. Owner, LLC, 2022 NY Slip Op 02944, First Dept 5-3-22

Practice Point: Plaintiff was apparently injured at work. A lawyer for his employer approached him about signing releases. Plaintiff signed, allegedly because he

believed he would lose his job if he didn't. Therefore there was a question of fact about whether fraud, duress or mutual mistake invalidated the releases.

CONTRACT LAW, FRAUD, PLEADING.

THE FRAUD CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE IT WAS NOT DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION; CRITERIA EXPLAINED (FIRST DEPT).

IS Chrystie Mgt. LLC v ADP, LLC, 2022 NY Slip Op 02950, First Dept 5-3-22

Practice Point: Fraud causes of action are often dismissed as duplicative of breach-of-contract causes of action. Here the fraud cause of action should not have been dismissed because the misrepresentations concerned present facts, not a future intent to perform. In addition, the complaint sought damages for fraud that were not sought for breach of contract.

CRIMINAL LAW, DNA DATATBASE, FAMILIAL MATCH.

PETITIONERS. RELATIVES OF PERSONS IN THE NYS DNA DATABASE, HAD STANDING TO CHALLENGE THE RESPONDENTS' REGULATIONS ALLOWING THE RELEASE OF "FAMILIAL DNA MATCH" INFORMATION LINKING DNA FROM A CRIME SCENE TO A FAMILY, NOT AN INDIVIDUAL; THE REGULATIONS WERE BASED ON SOCIAL POLICY AND THEREFORE EXCEEDED THE REGULATORY POWERS OF THE RESPONDENT AGENCIES; TWO-JUSTICE DISSENT ARGUED THE PETITIONERS DID NOT HAVE STANDING TO CHALLENGE THE REGULATIONS (FIRST DEPT).

Matter of Stevens v New York State Div. of Criminal Justice Servs., 2022 NY Slip Op 03062, First Dept 5-5-22

Practice Point: Relatives of persons in the NYS DNA database had standing to challenge the regulations issued by the respondent agencies allowing the release of "familial DNA match" information linking DNA from a crime scene to a family, not an individual.

Practice Point: The "familial DNA match" regulations were deemed to be rooted in social policy, which is the realm of the legislature, and therefore the promulgation of the regulations exceeded the agencies' powers.

CRIMINAL LAW, SECOND FELONY OFFENDER, OUT-OF-STATE CONVICTION.

WHETHER DEFENDANT'S CONNECTICUT CONVICTION CAN SERVE AS A PREDICATE FOR SECOND FELONY OFFENDER STATUS CANNOT BE DETERMINED WITHOUT THE CONNECTICUT ACCUSATORY INSTRUMENT; THE UNPRESERVED ISSUE WAS CONSIDERED IN THE INTEREST OF JUSTICE; MATTER REMITTED FOR A HEARING (SECOND DEPT).

People v Robinson, 2022 NY Slip Op 03010, Second Dept 5-4-22

Practice Point: Here portions of the Connecticut larceny statute were equivalent to a New York felony and other portions were not. Therefore, whether the Connecticut conviction could serve as a predicate for second felony offender status cannot be determined without examining the Connecticut accusatory instrument. The issue was not preserved for appeal but was considered in the interest of justice. Matter remitted for a hearing.

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), SEALING OF RECORD.

AT THE TIME DEFENDANT COMMITTED THE OFFENSE IN 2007, IT WAS NOT A REGISTRABLE OFFENSE UNDER THE SEX OFFENDER REGISTRATION ACT; THEREFORE DEFENDANT'S MOTION TO SEAL THE RECORD SHOULD NOT HAVE BEEN SUMMARILY DENIED; MATTER REMITTED FOR A HEARING (SECOND DEPT).

People v Miranda, 2022 NY Slip Op 03009, Second Dept 5-4-22

Practice Point: If an offense is now a registrable offense pursuant to the Sex Offender Registration Act, but was not a registrable offense when committed (here in 2007), a defendant's motion to seal the record cannot be summarily denied. The motion may still be denied after a hearing, however.

DEFAMATION, "CRIMINAL SLURS," PURE OPINION.

EVEN CRIMINAL SLURS ARE NOT ACTIONABLE AS DEFAMATION IF THEY ARE PURE OPINION; HERE DEFENDANT'S TWEET ACCUSING PLAINTIFF OF MAKING "THREATS" WAS NOT ACTIONABLE (SECOND DEPT).

Bowen v Van Bramer, 2022 NY Slip Op 02975, Second Dept 5-4-22

Practice Point: A tweet accusing plaintiff of making "threats" against defendant city council member (representing Queens) was not actionable as defamation. Plaintiff, a restaurant owner, had texted defendant saying that people would work to end defendant's political career if he didn't retract his opposition to Amazon's building a corporate headquarters in Queens. Defendant then posted plaintiff's comments in a tweet and accused plaintiff of making "threats." Plaintiff sued for defamation based on that tweet. In dismissing the complaint, the Second Department noted that even "criminal slurs" are not actionable where, as here, they are "pure opinion."

FORECLOSURE, BANK'S STANDING.

TO CHALLENGE THE BANK'S STANDING TO FORECLOSE THE DEFENDANT MUST ASSERT THE LACK OF STANDING AS AN AFFIRMATIVE DEFENSE; MERELY DENYING THE RELEVANT ALLEGATIONS IN THE COMPLAINT IS NOT ENOUGH (SECOND DEPT).

Aurora Loan Servs., LLC v Jemal, 2022 NY Slip Op 02970, Second Dept 5-4-22

Practice Point: Lack of standing in a foreclosure action must be raised as an affirmative defense. It is not enough to deny the relevant allegations in the foreclosure complaint.

FORECLOSURE, EVIDENCE, BUSINESS RECORDS.

THE BANK'S AFFIDAVIT IN THIS FORECLOSURE ACTION DID NOT LAY A SUFFICIENT FOUNDATION FOR THE ADMISSIBILITY OF BUSINESS RECORDS, INCLUDING PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 (SECOND DEPT).

Bank of N.Y. Mellon v Basta, 2022 NY Slip Op 02971, Second Dept 5-4-22

Practice Point: In a foreclosure action, at the summary judgment stage, even if business records demonstrating the bank's compliance with the notice requirements of RPAPL 1304 are submitted, they are not admissible unless a proper foundation (CPLR 4518(a)) is laid in the accompanying affidavit.

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), SEPARATE-ENVELOPE RULE.

THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; I.E., THE NOTICE MUST BE MAILED IN A SEPARATE ENVELOPE WITH NO OTHER MATERIALS, AND THE NOTICE MUST BE SENT SEPARATELY TO EACH BORROWER (SECOND DEPT).

HSBC Bank USA, N.A. v DiBenedetti, 2022 NY Slip Op 02983, Second Dept 5-4-22

Practice Point: RPAPL 1304, which must be strictly complied with by the bank in any foreclosure action, requires (1) that the 90-day notice of foreclosure be sent in a separate envelope which includes nothing else and (2) that the 90-day notice be sent separately to each borrower.

LABOR LAW-CONSTRUCTION LAW, FALL FROM BATHTUB RIM.

PLAINTIFF FELL OFF THE EDGE OF A BATHTUB WHEN HE WAS ATTEMPTING TO INSTALL A SHOWER-CURTAIN ROD; THE EDGE OF THE TUB WAS THE EQUIVALENT OF A SCAFFOLD AND PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION; TWO-JUSTICE DISSENT (FIRST DEPT).

Vitucci v Durst Pyramid LLC, 2022 NY Slip Op 02968, First Dept 5-3-22

Practice Point: Here plaintiff fell attempting to stand on the edge of a bathtub to install a shower-curtain rod. The majority concluded the edge of the bathtub was the equivalent of a scaffold and plaintiff's fall was covered under Labor Law 240(1). Two dissenters argued the job could have been performed from ground level.

LABOR LAW-CONSTRUCTION LAW, SUBCONTRACTOR LIABILITY.

ALTHOUGH PLAINTIFF FELL FROM THE SCAFFOLDING SYSTEM CONSTRUCTED BY SWING, A SUBCONTRATOR, PLAINTIFF'S LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION AGAINST SWING SHOULD HAVE BEEN DISMISSED; SWING WAS NOT A CONTRACTOR OR OWNER, OR A CONTRACTOR'S OR OWNER'S STATUTORY AGENT, WITHIN THE MEANING OF THE STATUTES (FIRST DEPT).

Guevara-Ayala v Trump Palace/Parc LLC, 2022 NY Slip Op 03049, First Dept 5-5-22

Practice Point: Here the subcontractor which constructed the scaffolding from which plaintiff fell was not a contractor or owner, or a contractor's or owner's statutory agent within the meaning of Labor Law 240(1) or 241(6). Therefore the Labor Law 240(1) and 241(6) causes of action against the subcontractor should have been dismissed.

NEGLIGENCE, SLIP AND FALL, CONSTRUCTIVE NOTICE.

DEFENDANTS DID NOT DEMONSTRATE THEY DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION OF THE STAIRS ALLEGED TO HAVE CAUSED PLAINTIFF'S SLIP AND FALL BECAUSE THEY OFFERED NO PROOF OF WHEN THE STAIRS WERE LAST INSPECTED (SECOND DEPT).

Weiss v Bay Club, 2022 NY Slip Op 03026, Second Dept 5-4-22

Practice Point: In a slip and fall case, to warrant summary judgment the defendant must show it did not have constructive notice of the dangerous condition by demonstrating that the area of the fall was inspected close in time to the incident.

NEGLIGENCE, SLIP AND FALL, CONTRACTOR LIABILTY.

A CONTRACTOR WHICH CREATES A DANGEROUS CONDITION ON A PUBLIC SIDEWALK MAY BE LIABLE FOR A SLIP AND FALL BY A MEMBER OF THE PUBLIC (SECOND DEPT).

Pizzolorusso v Metro Mech., LLC, 2022 NY Slip Op 03018, Second Dept 5-4-22

Practice Point: Contactors which create a dangerous condition on a public sidewalk or road may be liable to a member of the public who is injured by the dangerous condition. The theory is similar to the "launch an instrument of harm" theory of contractor liability under the Espinal case.

NEGLIGENCE, TRAFFIC ACCIDENTS.

ALTHOUGH PLAINTIFF WAS STRUCK IN THE ON-COMING LANE WHILE ATTEMPTING A LEFT TURN IN AN INTERSECTION, THERE WERE QUESTIONS OF FACT WHETHER DEFENDANT SHOULD HAVE SEEN THE PLAINTIFF (SECOND DEPT).

Blake v Francis, 2022 NY Slip Op 02974, Second Dept 5-4-22

Practice Point: Although plaintiff may have violated the Vehicle and Traffic Law by making a left turn in the path of defendant's car, there can be more than one proximate cause of an accident. Here there was a question of fact whether defendant should have seen the plaintiff as he attempted the turn.