NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
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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. 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 on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Report.

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The Second Department, upon remittal from the Court of Appeals, adhered to its prior decision finding defendant's certification as a sex offender unlawful. The Court of Appeals ruled that sex-offender certification is not part of a sentence and therefore is not covered by an exception to the preservation requirement. But, because the Appellate Division, unlike the Court of Appeal, has "interest-of-justice" jurisdiction, the prior decision was upheld in the interest of justice by the Second Department, despite the lack of preservation:

In an opinion dated November 23, 2021, the Court of Appeals concluded that sex offender certification is not part of a defendant's sentence, and thus, a contention regarding sex offender certification does not fall within the exception to the preservation rule for challenges to unlawful sentences … . However, the Court of Appeals noted that although it does not have interest-of-justice jurisdiction to review unpreserved issues, the "Appellate Division may have authority to take corrective action in the interest of justice based upon defendant's unpreserved

challenge to the legality of his certification as a sex offender" … . Accordingly, the Court of Appeals remitted the matter to this Court for further proceedings … .

We now reach the defendant's unpreserved contention in the exercise of our interest of justice jurisdiction (see CPL 470.15[3][c]; [6][a]). For the reasons stated in our prior opinion and order, the defendant's certification as a sex offender was unlawful … .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).

The Second Department, in a full-fledged opinion, in a matter of first impression, by Justice Christopher, determined the New York Child Victims Act, CPLR 214-g, is not available to nonresident plaintiffs where the alleged acts of abuse occurred outside New York. CPLR 214-g extends the statute of limitations to allow lawsuits by plaintiffs who were children at the time of the abuse. The Second Department further determined CPLR 214-g does not preclude the application of the borrowing statute, CPLR 202. Here the plaintiff, a Florida resident, alleged the acts of abuse were committed in Florida in 1983 and 1984 by Father William Authenrieth. Plaintiff alleged Father Authenrieth was transferred from the Diocese of Brooklyn

to the Florida Diocese of Orlando (Florida) in 1973 because of his sexual misconduct with children. Hence the suit by the Florida plaintiff against the Diocese of Brooklyn. Because CPLR 214-g does not apply and CPLR 202, the borrowing statute, requires the application of Florida's four-year statute of limitations, plaintiff's suit is time-barred:

… [U]nder the circumstances of this case, CPLR 214-g does not apply extraterritorially, where the plaintiff is a nonresident, and the alleged acts of sexual abuse were perpetrated by a nonresident outside of New York … . * * *

… [U]nder these circumstances the borrowing statute would apply, and since the plaintiff's action is time-barred in Florida, it would also be time-barred in New York, unless, as argued by the plaintiff, CPLR 214-g precludes the application of CPLR 202. … We answer that question in the negative. Therefore, even if CPLR 214-g applied extraterritorially, the plaintiff's action would be dismissed as time-barred pursuant to CPLR 202. 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).

The Second Department, reversing (modifying) Supreme Court, determined plaintiffs were entitled to amplify the allegations in the supplemental bill of

particulars in second and proposed third supplemental and amended bill of particulars:

The plaintiffs were entitled to amend their bill of particulars once as of right at any time prior to the filing of the note of issue … . Such amendment enables a party to include whatever could have been included in the original bill of particulars … . "'Whatever the pleading pleads, the bill must particularize since the bill is intended to [afford] the adverse party a more detailed picture of the claim . . . being particularized'" … . 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).

The Third Department, over an extensive dissent, determined the relation-back doctrine did not save the petition challenging a use variance. The initial petition was dismissed for failure to name a necessary party, Rosa Kuehn. The subsequent amended petition, which included the necessary party, was dismissed as time-barred:

Supreme Court correctly determined that petitioners are not entitled to the benefit of the relation back doctrine. That doctrine "permits a petitioner to amend a petition to add a respondent even though the statute of limitations has expired at the time of amendment so long as the petitioner can demonstrate three things: (1) that the claims arose out of the same occurrence, (2) that the later-added respondent is united in interest with a previously named respondent, and (3) that the later-added respondent knew or should have known that, but for a mistake by petitioners as to the later-added respondent's identity, the proceeding would have also been brought against him or her" … .

… [P]etitioners simply cannot meet the third and final condition and therefore cannot avail themselves of the doctrine. Indeed, Rosa Kuehn was appropriately named as a respondent and identified as the landowner of the subject property in petitioners' successful challenge to the use variance issued in 2013 … ; "thus, this simply is not an instance where the identity of a respondent . . . was in doubt or there was some question regarding that party's status" … . 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).

The Second Department, reversing Supreme Court, determined defendant waived any claim of a lack of personal jurisdiction. The plaintiff, rejecting defendant's

answer as untimely, indicated the answer was deemed to be a notice of appearance, which is the equivalent of personal service of the summons:

An appearance of the defendant is equivalent to personal service of the summons upon him or her, unless an objection to jurisdiction pursuant to CPLR 3211(a)(8) is asserted by motion or in the answer … . Here, the plaintiff submitted evidence that the defendant served an answer upon it on or about January 20, 2015. That answer did not assert the defense of lack of personal jurisdiction. The plaintiff rejected the answer as untimely and advised the defendant that it would deem the untimely answer a notice of appearance by the defendant. The defendant did not object to the plaintiff treating her untimely answer as a notice of appearance . The defendant did not assert lack of personal jurisdiction until moving, inter alia, pursuant to CPLR 3211(a)(8) to dismiss the complaint more than two years later … . Therefore, she waived the defense of lack of personal jurisdiction … . 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).

The First Department, reversing (modifying) Supreme Court, determined plaintiff raised a question of fact about whether the releases were signed by plaintiff because of fraud, duress and/or mutual mistake. The facts are not described. Apparently plaintiff was injured at work and he alleged that he believed he would lose his job if he didn't sign the releases:

"A release, even though properly executed, may nonetheless be void. Where fraud or duress in the procurement of a release is alleged, a motion to dismiss should be denied" … . Specifically, plaintiff alleged that Selina Maddock, a lawyer, was sent by their employer Navillus to secure plaintiff's signature on the release, before he retained counsel, and made both the promise that he would have a job if he signed the releases, and the implicit threat that he would not have a job in the future if he failed to sign. He further alleged that Maddock advised plaintiff that he did not need to consult counsel and misrepresented to plaintiff that he was only releasing claims against his employer, Navillus. Consistent with this, plaintiff testified that he did not understand that he was releasing anyone besides his employer. Furthermore, "a mistaken belief as to the nonexistence of presently existing injury is a prerequisite to avoidance of a release"; here, while defendants argue that plaintiff is merely mistaken as to the sequelae of a known injury, plaintiff raises a factual issue as to whether the additional injuries he claims to suffer from were a sequelae of his right knee injury. Forcing a Hobbesian choice on injured workers to accept a small settlement or else lose their job before they can ascertain the nature and scope of their injury is contrary to the strong public policy of New York state to protect injured workers, as reflected in the Labor Law…. . 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).

The First Department, reversing (modifying) Supreme Court, determined the fraud cause of action was not duplicative of the breach of contract cause of action and therefore should not have been dismissed:

The fraud claim is not duplicative of the contract claim … , this is not a case where "the only fraud alleged" was the defendant's "unkept promise to perform certain of its preexisting obligations under the parties' contract" … . Rather, plaintiff alleges, "Whenever ADP's services for Plaintiff[] proved to be deficient, ADP would purport to deal with the problem and then misrepresent to Plaintiff[] that the problem had been fixed, when . . . it had not." "Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract and therefore involves a separate breach of duty" … .

Moreover, plaintiff seeks at least some damages on its fraud claim that it does not seek on its contract claim … . 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).

The First Department, in a full-fledged opinion by Justice Gische, reversing Supreme Court, over a full-fledged two-justice dissenting opinion, determined the respondent agencies exceeded their regulatory powers when they authorized the release of so-called "familial DNA" information to be used as a possible lead for

identifying the perpetrator of a crime. In the absence of a DNA "match" or a "partial match" a "familial match" may indicate the perpetrator has a familial relationship with someone in the DNA database. A crucial threshold question was whether the petitioners, relatives of persons whose genetic profiles are in the New York State DNA database, had standing to contest the familial DNA regulations. The dissenters argued the petitioners did not have standing. The majority concluded the basis for the familial DNA regulations was primarily social policy, and therefore the regulations were legislative, rather than administrative, in nature:

Each petitioner's brother has genetic information stored in the DNA databank. Neither petitioner has been asked or mandated to provide DNA for comparison. Because they are law abiding citizens, neither petitioner knows if they have been targeted for investigation as a result of a familial DNA search, but they harbor great concern and anxiety that they might be investigated for no other reason than that they share family genetics with a convicted criminal … . * * *

We are not required to determine whether respondents made a good or beneficial policy decision. The fact that the decisions respondents made are by their very nature policy driven, greatly favors a conclusion that they were made in excess of respondents' authority. 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).

The Second Department, reversing (modifying) Supreme Court, ruled a hearing was required to determined whether defendant's Connecticut conviction could serve as a predicate offense for second felony offender status. The issue was not preserved and was considered in the interest of justice:

Although the defendant did not preserve for appellate review the issue of whether he was properly sentenced as a second felony offender, we reach that issue in the exercise of our interest of justice jurisdiction. The defendant's prior conviction in Connecticut was for larceny in the first degree under Connecticut General Statutes former § 53a-122(a). This statute defined grand larceny differently under several subdivisions, not all of which are felonies under New York law. To determine which subdivision applied to this defendant, the Supreme Court could have looked at the Connecticut accusatory instrument to determine the subdivision of the Connecticut statute under which the defendant was convicted … . However, the Connecticut accusatory instrument is not in the record.

Accordingly, in the interest of justice, we vacate the defendant's adjudication as a second felony offender and the sentence imposed, and remit the matter to the Supreme Court, Queens County, for a second felony offender hearing and for resentencing thereafter. 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).

The Second Department, reversing Supreme Court, determined the crime for which defendant was convicted, at the time of its commission in 2007, was not a registrable offense under the Sex Offender Registration Act (SORA). Therefore defendant's motion to seal the record should not have been summarily denied. The matter was remitted for a hearing:

… [A]t the time of the defendant's conviction for attempted promoting prostitution in the third degree (Penal Law §§ 110.00, 230.25), the definition of "sex offense" in Correction Law § 168-a(2) did not include convictions of an attempt to commit Penal Law § 230.25 … . Further, the defendant has never been required to register under SORA for this conviction. Accordingly, under the plain language of the statute, the defendant has not been not convicted of "an offense for which registration as a sex offender is required pursuant to article six-C of the correction law" (CPL 160.59[1][a] …). Thus, the Supreme Court should not have determined that the defendant's conviction falls into the category of excluded offenses … . Likewise, although CPL 160.59(3)(a) provides that the reviewing court must summarily deny the defendant's application when, inter alia, "the defendant is required to register as a sex offender pursuant to article six-C of the correction law," here, the defendant is not required to do so.

As the defendant's motion was not subject to mandatory denial under CPL 160.59(3) and the district attorney opposed the defendant's motion, a hearing on the defendant's motion was required … . 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).

The Second Department, reversing Supreme Court, determined even communications which could be considered "criminal slurs" are not actionable as defamation if they are "pure opinion." The defendant was a member of the NYC council representing Queens. When defendant opposed the construction of an Amazon corporate headquarters in Queens, plaintiff, a local restaurant owner, in text messages, indicated defendant's career would be ended if defendant did not withdraw his opposition to the Amazon project: Defendant then put out a tweet accusing plaintiff of making "threats." Plaintiff brought this defamation action based on that tweet.. Supreme Court denied defendant's motion to dismiss and the Second Department reversed:

The defendant's characterization of the plaintiff's text as containing "several threats rolled into one" is not a statement which can be proved true or false but was, instead, an opinion … . Moreover, "there is simply no special rule of law making criminal slurs actionable regardless of whether they are asserted as opinion or fact" … . Instead, "accusations of criminality [can] be regarded as mere hypothesis and therefore not actionable if the facts on which they are based are fully and accurately set forth" … . Here, the defendant's statement amounts to no more than "nonactionable opinion or rhetorical hyperbole" … . 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).

The Second Department, reversing (modifying) Supreme Court, determined that the bank in this foreclosure action was not required to affirmatively demonstrate standing, the defendant, to raise the issue, must assert lack of standing as an affirmative defense, and merely denying the relevant allegations in the complaint is not enough:

… [T]he plaintiff was not required to show its standing to maintain the action. "[W]here, as here, standing is not an essential element of the cause of action, under CPLR 3018(b) a defendant must affirmatively plead lack of standing as an affirmative defense in the answer in order to properly raise the issue in its responsive pleading" … . The mere denial of the allegation that the plaintiff was the owner and holder of the note and mortgage in the answer of Republic First Bank, without more, was insufficient to assert that the plaintiff lacks standing … . 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).

The Second Department, reversing (modifying) Supreme Court, determined the bank's proof of compliance with the notice requirements of RPAPL 1304 was deficient because the foundation for the admission of business records was not laid:

… [T]he plaintiff submitted … an affidavit of an employee of its current mortgage loan servicer, along with copies of the 90-day notice, which was generated by the plaintiff's prior loan servicer, along with alleged proof of mailing, which was also generated by the prior loan servicer. The affiant averred … that the current mortgage loan servicer is responsible for maintaining the books and records pertaining to the subject mortgage, "including, but not limited to, the account ledgers, and prior servicer's records." However, the affiant did not aver to her familiarity with the prior loan servicer's business practices and procedures, or that the prior loan servicer's records were incorporated into the current loan servicer's records. Thus, the plaintiff's moving affidavit failed to satisfy the admissibility requirements of CPLR 4518(a) … , and the prior loan servicer's records, including the 90-day notice, were not admissible … . "Accordingly, the plaintiff failed to demonstrate, prima facie, that it complied with the notice provision of RPAPL 1304" … . 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).

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff did not comply with the RPAPL 1304 requirements that the 90-day notice of foreclosure be mailed in a separate envelope and that the notice be sent separately to both borrowers:

… [T]he plaintiff failed to establish … that it strictly complied with RPAPL 1304, since additional material was sent in the same envelope as the 90-day notice required by RPAPL 1304 … , and a single notice was jointly addressed to both defendants … . 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).

The First Department, over a two-justice dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff alleged he needed to stand on the rim of a bathtub to install a shower-curtain rod. He hit his head and fell when attempting to step up on the rim of the tub. The defendants argued the installation could have been done from floor level. There was no room in the bathroom for an A-frame ladder:

The motion court properly granted plaintiff's motion for partial summary judgment on his section 240(1) claim. Plaintiff established prima facie that he was entitled to judgment by evidence that he suffered harm that "flow[ed] directly from the application of the force of gravity" when he fell from the edge of the bathtub, which served as the functional equivalent of a scaffold or ladder … . The evidence showed that there was insufficient room inside the bathroom for plaintiff to use an A-frame ladder and that plaintiff instead was forced to reach the elevated work area by standing on the edge of the bathtub in order to install the shower-curtain rods. Plaintiff testified that standing on the edge of the tub was necessary because he otherwise would lack the necessary leverage to tighten the screws with an Allen wrench.

In opposition, [defendants] failed to raise an issue of fact. They rely on an affidavit by their biomechanical expert, Mr. Bove, who opined that plaintiff's overhead reach was sufficient to perform the task while standing on the ground or inside the bathtub. Bove's initial affidavit, however, ignored plaintiff's testimony that he needed the height in order to have leverage so that he would have enough strength to tighten the screws with the Allen wrench. 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).

The First Department, reversing Supreme Court, determined the Labor Law 240(1) and 241(6) causes of action against Swing, the company which constructed the scaffolding, should have been dismissed. Plaintiff fell when, instead of using the scaffold walkway system, he attempted to descend from some scaffolding pipes to the wooden walkway and a wooden plank broke:

The lower court should have dismissed the Labor Law §§ 240(1) and 241(6) claims as against Swing, the scaffold system subcontractor to general contractor 4 Star, because it is undisputed that Swing was not a contactor or owner within the meaning of the statutes. Nor was it a contractor or owner's statutory agent. Although it contractually retained the right to reenter the premises and inspect the scaffold system, Swing did not have any employees on site during 4 Star's work, and it did not inspect the scaffold system while it was in place … . For all intents and purposes, once Swing constructed the scaffold system, it returned to the premises only to deliver supplies and to disassemble the scaffold system at the end of the project. 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).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this stairway slip and fall case should not have been granted. To warrant summary judgment on the issue of constructive notice, defendants must show when the stairway was last inspected, which they failed to do:

The defendants … failed to show … that they did not have constructive notice of the condition that the plaintiff alleged caused her to fall. "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" … . "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last . . . inspected relative to the time when the plaintiff fell" … . Here, the evidence submitted on the defendants' motion failed to demonstrate when the subject staircase was last inspected relative to the plaintiff's accident … . 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).

The Second Department, reversing Supreme Court, determined the defendant sidewalk-repair contractor's motion for summary judgment in this slip and fall case should not have been granted. There was a question of fact whether the contractor who repaired the sidewalk created the hole which caused plaintiff to trip. A contractor may be liable for an affirmative act of negligence which results in a dangerous condition on a public street or sidewalk:

"A contractor may be [held] liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk" … . Here, Amato [the defendant contractor] failed to establish its prima facie entitlement to judgment as a matter of law.

At his deposition, Victor Amato, Amato's owner, testified that his company had replaced a portion of the sidewalk at the subject location. … He acknowledged … that a two-by-four had been installed as a vertical "stake" to support a form that was used when the concrete was poured, and that he or one of his employees would have removed the stake after the concrete had set.

… [T]he plaintiff testified that she had not seen the hole because, from the direction she was walking, it was on the other side of an uneven, or sloped, portion of the sidewalk. Victor Amato admitted that this slope had been created deliberately (through a process known as "feathering") because the new portion of the sidewalk was at a different height from the existing sidewalk. 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).

The Second Department, reversing Supreme Court, determined the defendant's motion for summary judgment in this intersection traffic accident case should not have been granted. Although plaintiff was making a left turn when he was struck by defendant in the on-coming lane, there was a question of fact whether defendant should have seen plaintiff. Plaintiff was making the turn after a stopped driver in the on-coming law gestured to him:

… [A]lthough the defendant submitted evidence that the plaintiff failed to yield the right-of-way when turning left in violation of Vehicle & Traffic Law § 1141, the defendant failed to establish, prima facie, that the plaintiff's failure to yield was the sole proximate cause of the collision and that the defendant was free from fault … . While testifying, the defendant admitted that he saw nothing out of the ordinary prior to the collision, that he could not recall if he observed the plaintiff's vehicle, and that he only realized that there was a collision from hearing the sound. However, the defendant also testified that he was only driving at approximately 25 miles per hour and was looking straight ahead on a sunny afternoon with no obstructions to his view … . Moreover, the defendant acknowledged that he did not know if his vehicle or the plaintiff's vehicle entered the intersection first. Thus, the defendant's evidentiary submissions failed to eliminate triable issues of fact as to whether the plaintiff's vehicle was already in the intersection as the defendant approached and whether the defendant should have observed the plaintiff's vehicle making a left turn in time to take evasive action to avoid the accident … . 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.